Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TINA KRAIL, LORI CHADWICK,
DEBORAH SMOLDORE AND JEANNIE HENDERSON
Petitioners

- against -

THE STATE OF NEW JERSEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Once it is recognized that the life of a child begins at conception and the child is a separate, unique, and complete human being, does the child's mother have any true protectible interests which would support a right to intentionally take the life of her own child even before birth under the Fourteenth Amendment of the U.S. Constitution?

2. When does the life of a child begin?

3. Do children possess the natural and inalienable right to live or possess constitutional rights acquired through the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States at any time from conception to birth?

4. Whether it is violative of the natural and inalienable rights of a child or rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States for New Jersey to fail to recognize petitioners' standing to raise the rights of the child under the facts of this case?

5. Does a child before birth possess rights which, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?

6. Is it an unconstitutional infringement of Mr. Loce's child's natural and inalienable rights or the child's Fourteenth Amendment Due Process or Equal Protection rights for New Jersey to convict these petitioners of trespass under the facts of this case where the conduct of the petitioners was for the purpose of, and necessary for the defense of the

child's life, and the state's express purpose in prosecution and conviction was to allow the child's mother to intentionally terminate the life of the child?

7. Does a father have a Due Process and Equal Protection Right to defend the life of his child?

8. Whether this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992), *Roe v. Wade*, 410 U.S. 113 (1973), or other precedent prohibits the Courts of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to prohibit the criminal or quasi-criminal prosecution of petitioners under the facts of this case?

9. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey (through its legislative enactments, executive actions and the acts of its courts) which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioners are Tina Krail, Lori Chadwick, Jeannie Henderson, and Deborah Smoldore, all of whom assisted and aided co-petitioner Alexander Loce in his effort to save the life of his child at his request. Mr. Loce has filed a separate petition on his own behalf. Mr. Loce first instituted a civil suit in the Superior Court of New Jersey on September 7, 1990, seeking an injunction of the abortion of his child. When he exhausted his civil suit that night (New Jersey Supreme Court Justice Robert Clifford denied relief), Mr. Loce attempted to protect the child's life the next day, September 8, 1990, by blocking access to the operating room at the clinic where the child's mother sought to terminate the child's life. He requested the assistance of fourteen other persons including these four petitioners, and he chained himself to them, succeeding in preventing the child's death, until the State of New Jersey removed Mr. Loce and these petitioners from the premises.

Each of these petitioners bring a unique point of view to the Court. All are women who have been touched or harmed by abortion. They provide an important assistance in litigating the question of a woman's rights and those of her child. Tina Krail has had two abortions. Lori Chadwick is a single mother. Jeannie Henderson was seven months pregnant on September 8, 1990 when she was arrested in this case. She carried and gave birth to her baby only after changing her original decision to have an abortion because she learned of information unavailable to her through an abortion clinic. Deborah Smoldore has been active in bringing attention to the fact that abortion is an exploitation of a woman and her child.

Respondent is the State of New Jersey which refused to provide Mr. Loce and his child access to court by dismissing his civil complaint and then arrested, prosecuted and convicted him and petitioners Krail, Chadwick, Henderson, and Smoldore of trespass for defending the child's life. The other ten co-defendants, have not filed a Petition.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1993

No. 93-

Tina Krail, Lori Chadwick,
Jeannie Henderson and Deborah Smoldore

Petitioners

v.

The State of New Jersey

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

Petitioners, Tina Krail, Lori Chadwick, Jeannie Henderson and Deborah Smoldore, respectfully pray that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of New Jersey entered on October 21, 1993 and the judgment and opinion of the Appellate Division of the Superior Court of New Jersey entered June 30, 1993.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The April 29, 1991 opinion of the Municipal Court of Morristown convicting petitioners under N.J.S.A. 2C:18-3 (trespass) is at A-201. The opinion of the Superior Court of New Jersey, Law Division, affirming the convictions is at A-89-106 [630 A.2d 843 (1991)]. The opinion of the Appellate Division of

the Superior Court, dated June 30, 1993, affirming the convictions solely on Federal Grounds, citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) is at A-82-88 [630 A.2d 792 (1993)]. The Order of the New Jersey Supreme Court entered on October 21, 1993 denying Certification is at A-204.[1]

STATEMENT OF JURISDICTION

Petitioners seek a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered October 21, 1993 and the opinion and order of the Appellate Division of the Superior Court of New Jersey, dated June 30, 1993. The Petitioners have claimed rights under the constitution of the United States, all the issues presented were raised below and the jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

[1] These petitioners adopt the arguments of petitioner Loce in his separate petition, especially Point II, the rights of the child. This petition addresses issues unique to these petitioners and elaborates on others.

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

The petitioners were prosecuted and convicted for attempting to save the life of Mr. Loce's child. This is an abortion case which requires a determination of whether a state has the power to deny any class of individuals natural and inalienable rights, whether women truly have interests inconsistent with their child's interest in life sufficient to support the right of a mother to terminate the life of her own child, and whether New Jersey's actions are violative of the Constitution of the United States.

A. STATEMENT OF FACTS[2]

On September 8, 1990 petitioners Krail, Chadwick, Henderson, and Smoldore, at the express request of Alexander loce, went to an abortion clinic in Morristown, New Jersey to help defend and protect the life of Mr. Loce's child. They chained themselves to Mr. Loce and succeeded in preventing the child's death until the State of New Jersey removed them from the premises. As a result of the State's action the child's life was subsequently terminated.

[2] These petitioners adopt facts set forth in the petition of Mr. Loce.

These petitioners were thereafter prosecuted and convicted of a violation under N.J.S.A. 2C:18-3(b) (trespass). [A-85-86]

B. PROCEDURAL HISTORY

The presence of these petitioners was necessary for Mr. Loce to successfully defend his child's life, and the New Jersey Courts specifically found that their intention in going to the clinic was to defend the life of the child. The State's purpose in removing and prosecuting them was to permit the termination of the child's life and protect the "right" of the mother to terminate the child's life [A-85-88]. On April 29, 1991 Judge Noonan found, as a matter of fact, that the life of a person begins at conception, and that the eight week old "fetus" was a "person", a "human being", and was a "separate and distinct human being from the mother, was a living person, ... unique and individual" [A-98]. Nonetheless, he convicted the petitioners under N.J.S.A. 2C:18-3(b) because he felt bound by this Court's decision in *Roe v. Wade*, supra, which, he stated "legalized the execution of a human being" [A-200].

These petitioners filed timely appeals at every phase of the appellate process, resulting in the Appellate Division of the Superior Court affirming their convictions solely on federal grounds. The Appellate Division reasoned:

> The rights to an abortion guaranteed by the due process clause of the Fourteenth Amendment established by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, (1973)...has only recently been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _ 112 S.Ct. 2791 (1992). The purported rights asserted by defendants independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. The simple and overriding fact is that each defendant committed a petty disorderly persons offense in an attempt to prevent a *legal and constitutionally protected abortion*. [A-86-87]

From the moment the petitioners were removed from the premises of the clinic until the final order was entered in this case New Jersey was acting to further and protect what it perceived to be the constitutional right of a woman to terminate the life of her child. That this Court has never decided when, in fact, the life of a child begins, and whether a child has rights prior to birth (given the now undisputable fact of the child's existence) requires the Court to grant certiorari. The child's rights have never been directly examined by this Court and the child's personal interest in life has never been weighed. Likewise, a mother's true interests have never been identified and examined in the context of the child's actual existence. These issues are presented by this petition.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. _ 112, S.Ct. 2791 (1992), both the Joint Opinion and the Dissent stated

it was necessary *Roe* be reexamined.[3] *Casey*, however, did not reexamine the questions of when the life of a child begins or whether the child possesses constitutional rights prior to birth.[4] As a result, *Casey* failed to reexamine *Roe* in its most critical aspect. If the life of a human being, a child, begins at conception, this fact has a substantial consequence for the legal issues concerning the child's rights [see Loce Pet. Pt. IA & Pt. II]. But this fact has an important relevance to the real nature of a woman's interests as a pregnant mother. It is critical to the child that the child's interest in actual life be recognized,[5] but it is equally critical that the true nature of the real interests of the women of this nation be identified, recognized and protected.

Until now this court has only attempted to balance a very limited set of perceived "interests" of a woman against a poorly

[3] *Casey*, 112 S.Ct. at 2804; Rehnquist, C.J., dissenting 112 S.Ct. at 2855.

[4] Justice Scalia, dissenting, observed the critical importance of whether the child enjoys actual life. 112 S.Ct. at 2875. Justice Stevens alone addresses the question of the child's rights in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

[5] These petitioners adopt the legal argument found in the Loce Pet. concerning the rights of the child and its consequences [see Loce Pet Pt. IA & Pt. II]. These pettitioners elaborate on the mother's protectible interests.

defined "interest" of the states without the benefit of determining whether the child is a human being prior to birth. As a result the "interests" of a mother have not been satisfactorily identified, and their nature never completely defined. The problem stems from the Court's conclusion that it could not, in 1973, reach reliable judgment about the fact of the child's existence (and therefore ignored the child's substantive interest in actual life and the mother's real interests). The fact of the child's existence materially alters the true nature of the interests of a woman. Her interests as a pregnant mother must be taken into account, and they conflict with any "interests" before pregnancy which are inconsistent with those of the child. Ignoring this reality has resulted in harm to the mothers subjected to abortion as a "remedy" to satisfy unprotectible "interests" in conflict with her real ones. [See, Pt. II].

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES AND A LARGE BODY OF NEW FACTUAL DATA SUPPORT THE CONCLUSION THAT: (1) THE LIFE OF A PERSON BEGINS AT CONCEPTION. AND (2) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE VERY EARLY STAGES OF DEVELOPMENT. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A MOTHER'S PERSONAL INTERESTS ARE COMPATABLE WITH HER CHILD'S INTEREST IN LIFE, AND WHETHER SHE HAS ANY "PROTECTIBLE" INTERESTS WHICH JUSTIFY HER TEMINATING HER CHILD'S LIFE.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in

1973 it was not possible to determine when life began:

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

Roe is the only case in which the United States Supreme Court reviewed that issue.[6] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which reserved that question for a later Court when "man's knowledge" is sufficient. Because *Roe* did not determine when the life of a child began, its legal analysis was irrelevant to questions concerning the child's rights, and also the legal inquiry concerning the nature of a mother's interests protectible under the Due Process Clause, once it is found that the child is a human being prior to birth. [See Loce Pet. Pt. IA]. Because of this expressed inability, *Roe*: [1] ignored what would otherwise have been applicable principles of constitutional interpretation as they apply to the rights of the child [see, IIB Loce Pet.]; and [2] misidentified a woman's true interests to the detriment of the woman of this

[6] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe* dealing with the question of the humanity and rights of the child.

nation [see, Point II below].

2. The Question of the Mother's Rights is the Sort of Mixed Question of Fact and Law Which Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, Show that that Precedent Erroneously Applied Constitutional Principles.

Stare decisis is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[7] Of particular relevance is the dissent of Justice Brandeis[8] in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause...; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision, ... is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by

[7] The question of when life begins and whether the child has rights prior to birth is one of first impression and *stare decisis* does not apply. If it applies to the interests and rights of the mother, however, there are at least one hundred and seventy-four instances in which this Court has overruled, in whole or in part, its previous constitutional decisions. See Appendix A at A-1-18 bound with Loce Pet. and Loce Pet. p. 10, Fn 6.

[8] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.* 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

> a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a pregnant mother has a protectible interest in taking her child's life under the Fourteenth Amendment and whether a child is a person protected by the Due Process Clause, are both mixed questions of fact and law—this type of determination. In reaffirming that portion of *Roe* which found that the Due Process Clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[9] or moral grounds,[10] and articulated a reluctance to do so [at 2814]. Only two justices were willing to expressly state *Roe* was legally correct. The Court reaffirmed *Roe* based upon *stare decisis* and special considerations because of a divisive national debate. Whether the principles outlined in *Casey*

[9] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, 505 U.S. , 112 S.Ct. at 2817.

[10] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in this case.[11]

B. THE LIFE OF A CHILD BEGINS AT CONCEPTION. THE NUMEROUS AND SIGNIFICANT SCIENTIFIC DISCOVERIES SINCE *ROE V. WADE* SUPPORT THIS CONCLUSION. THERE NOW EXISTS A CONSENSUS IN SCIENCE AND MEDICINE CONCERNING THE FACTS WHICH FORM THE BASIS FOR THIS CONCLUSION. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHEN LIFE BEGINS AND THE RIGHTS OF THE CHILD.

1. Introduction

Since *Roe* was decided in 1973, there has been an explosion in scientific technology which has fundamentally altered the capability and manner in which science acquires knowledge of human development. Science can now investigate human development at the molecular level, using recombinant DNA technology[12] and monoclonal antibody technology,[13] if the instructions (made up of DNA and RNA) to make a particular

[11] This court has never decided the question of the child's rights or those of the mother's in the light of the fact the child is a human being before birth. But even if *Roe* can be considered to have decided the question, two critical distinctions made by Justice Brandeis apply here. First, the problem is not one of interpretation, but rather one of applying a recognized right to specific circumstance. Secondly, the legal question of whether the unborn child enjoys constitutional rights is a mixed question of fact and law as is the question of the protectibility of a mother's interests to terminate the life of her child.

[12] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[13] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985.

protein exist and also if that instruction has been transcribed (read). It can be determined if a specific protein has been produced from specific genetic instruction.[14] These scientific techniques, combined with immunochemistry technology, can be used to show that a particular protein is present in a specific sample and when combined with an appropriate visualization technique, the location of the protein in the sample can be determined. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations. In 1973 a scientist would observe a physical structure such as the cerebral cortex or dendritic spines, and when that structure was not present or was removed, the scientist would observe what appeared to happen (the visual result). Today we can learn what is occurring in human development before we can see specific structures develop. We now look at a human's building blocks, the proteins and instructions that control the proteins, to view what develops at a molecular level, and when it develops. On a macroscopic level, the new technology of ultrasound has accommodated,

[14] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at p. 129.

with unprecedented clarity, observation of the child and the child's reaction to its environment. Advances in electroencephalography have allowed for the early detection of brain wave activity in the fetus. These investigations demonstrate vast increases in knowledge concerning the child since 1973. Many scientists made incorrect assumptions at that time concerning the child's existence as a unique human being from conception, the child's development from conception to old age, ability to react to its environment and to feel pain prior to birth.

The origin and extensive use of the molecular biological techniques since 1973 have dramatically changed the way in which modern biology is conducted. By using DNA probe technology, combined with the Southern Hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with polymerase chain reaction (PCR)[15] it is possible to identify the presence of a specific genetic code

[15] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

material in a sample as small as one cell[16]. The technology can determine genetic uniqueness, research genetic diseases, and observe human development at a molecular level, as never before.

2. The Life of Each Person Begins at Conception.

The life of a human being begins at the moment of conception when the sperm of a father penetrates inside the mother's ovum and all of the genetic material and information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present immediately after conception.[17] Either all the necessary

[16] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

[17] Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974. "The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20 millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242; Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development*

genetic information is present for conception of a human being for development to full stages of human growth (after the moment of the entry of the sperm into the ovum) or the genetic information is insufficient, conception will fail and no human being shall

and Personality 5th ed. New York: Harper & Row, 1979. "The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52. "Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its own." pp. 52-53. "This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. "Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine form its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. "The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410. "Genetically the zygote is complete. It represents a new single celled individual." Moore K. *Before We Are Born*, 3rd ed. Philadelphia: WB Saunders Co. 1989. "Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25. See, LeJeune, at A-115 to A-124. See also, the numerous authorities found following Loce Pet. at A-19 to A-30.

exist.[18] Not only is it possible to identify this first cell after conception as being human, the individual entity is complete and can be identified.[19] There is without doubt a complete, separate, identifiable human being immediately after conception.[20]

[18] Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584. LeJeune, A-115, 116.

[19] Moore, K. *Before We Are Born*, 3rd ed. Philadelphia W.B. Saunders Company 1989. "Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produce a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26. Turner, J.S.; and Helms, D.B. Lifespan Developmental 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. "Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52 "Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. "You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product from the moment of conception onward."

[20] Moore, *supra*, 26-28; Volpe, *supra*, 18-20. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980. Clark, J. ed. *The Nervous*

Within the process of fertilization, the egg, a little sphere of one and one-half millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg.

System: Circuits of Communication In The Human Body. Torstar Books, Inc., 1985. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child*. Homewood, IL: The Dorsey Press, 1977. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982). Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed and within microseconds becomes completely impenetrable by any other sperm.[21]

The necessary genetic information to create a human being is created in DNA. Dr. Jerome LeJeune, petitioners' genetic expert at trial described this information as analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that it can be put on the point of a needle. It contains twenty-three chromosomes. The ovum also contains twenty three chromosomes. The interaction of the biological components is like a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud

[21] Moore, supra, at 25.

speaker. What is experienced by a listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg which receives the tape band from the father there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information.[22]

The recent discoveries concerning methylation of cytosine, and development of DNA fingerprinting technology both establish the completeness, uniqueness, irreplacability of each individual human being from the moment of conception. See Loce Pet. at IB.

Molecular biology has present application in the detection of fetal abnormalities and fetal sex determinations through the analysis of the very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood

[22] See, LeJeune, petitioner's appendix A-116 to A-119.

cells of the mother).[23] Using cell sorting technology and DNA probe technology, scientists can now determine, for example, the presence of a child from a sample of 4 ml of the mother's blood.[24]It is an established principle of human genetics and heredity that an individual human's cells all contain the same DNA composition (except sperm and ovum cells)[25] so that the few fetal cells that are found in the mother's bloodstream demonstrate the presence of the unique human existing separately in the mother's womb.

The ability to detect genetic disorders before birth has improved dramatically during the last two decades.[26] The application of

[23] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[24] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[25] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Olds, S.W. *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51.

[26] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976.[27]

Another advancement is the use of chorionic villus sampling. It was only in 1982 that its potential use in determining genetic disorders was realized. Because the trophoblastic tissue has the same "genetic constitution" as the child, a sample from the chorionic villi reflects the chromosomal, biochemical, and DNA status of the child. Therefore, the production of trophoblastic tissue is controlled by the child's DNA and not that of the mother. This procedure uses tissue collected in the first twelve weeks of life.[28] "In vitro" fertilization demonstrates that the child is a unique human being from conception. Before implantation the new human being is clearly separate from its mother. During the period after fertilization and before implantation, it has been possible to determine the sex of the child, whose development is started by

[27] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

[28] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

a clear physical separation from the mother and father.[29] The preimplantation diagnosis of certain genetic diseases has also been considered a feasible medical advance.[30] These procedures support the conclusion that pre-implanted human embryo is a genetically unique and complete human being.

The goal in the study of human embryo viability in synthetic culture medium is improved development and pregnancy success. Recently an embryo derived platelet activating factor was discovered, which when added to growth media, has dramatically increased the developmental and pregnancy potential of the embryo.[31] This chemical, a product of the new human, supports the conclusion that, even before implantation, there is an independent, unique human capable of producing substances that enhance its own survival. The "fetus" is not "part of" a "woman's body." If it were the mother's body would control the child's genetic growth

[29] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

[30] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

[31] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

and development. Using modern molecular biology technology, not available in the 1970's, it has been found that by the third cell division after fertilization control of growth and development has been established by the child's DNA.[32]

In 1981 the Subcommittee on Separation of Powers of the Judiciary Committee of the United States Senate conducted extensive hearings on the question of when life began based upon the knowledge of science at that time. The committee concluded:

> ...Life of a human being begins at conception ... today the facts are beyond dispute ... physicians, biologists and other scientists argue that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings.[33]
>
> There simply is no credible evidence to refute this conclusion.[34]

3. The Child Experiences Pain Shortly After Conception.

Studies have resulted in data and information which show that the child is subjected to great pain during an abortion, and as early as eight weeks after conception.

(a) The New Technology and Pain Transmission.

[32] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

[33] Report on Human life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

[34] See Loce pet. IB; see list of authorities in appendix following Loce pet. at A-19 to A-30 that concludes that life of the child begins at conception.

Development of techniques of monoclonal antibody production, first described in 1975 using mouse material and then further developed to allow the production of specific human antibodies in the early 1980's[35], has complemented DNA and RNA studies which are the subject of Molecular Biology, by allowing for the specific detection and location of individual proteins or peptides in a human cell sample. Monoclonal antibody technology[36], and recent developments in modern protein chemistry and electrophysiology, are being applied to human developmental neurobiology. Initially applied in the mid 1980's, the new techniques were recognized as having the potential to revolutionize our understanding of the human nervous system at it's inception. Scientists recognized that with the new technology they could investigate nervous system function and development at the molecular or chemical level, no longer limited to observations of the histological presence of nerves and other gross functionality. This technoiogical application

[35] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

[36] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

shows that the classical histological and functional criteria for defining (nerve) cell types was oversimplified.[37]

One result was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since 1973 similar substances have been found to be present in nerve fibers. This discovery was described in 1985 as revolutionary.[38] These neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two important neuropeptides are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[39] The detection of these two neuropeptides in samples of human tissue has been used to define and locate nervous system development and function in the human being

[37] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[38] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[39] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

from the time of conception. Due to accelerated pace of study since 1985, the study of neuropeptides disclosed a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which were available in the 1970's.

The crude ultrasound devices available in the early 1970's permitted limited access to knowledge of a child during the early stages of growth. "Real time ultrasound" was developed in 1976 and actually created a motion picture which depicts movement and function such as breathing, urination, swallowing and other functions of the human existence. This visualization permits diagnosis of a child's illnesses while in a mother's womb. Medicine can now watch how the child functions including such intricate detail as the operation of the tiny little valves of the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at four to

five months.[40]

(b) Fetal Pain.

Since the time of *Roe v. Wade* there have been a number of generally accepted assumptions about human neurological development and our ability to feel pain that have been refuted. [Loce Pet. IB]. Since 1981, the field of fetal surgery developed dramatically. It is common practice to monitor fetal vital signs and to give the fetus anesthesia.[41] "Although the mother is anesthetized for fetal surgery, the fetus becomes the prime target for the anesthesia."[42] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient,

[40] See, Nathanson at A-155 to A-157. See also subsection (b) below.

[41] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

[42] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[43] Studies indicate that performing surgery on unanesthetized fetuses results in automic nervous system stimulation, increased hormonal activity, increased motor activity, and variations in heart rate.[44] Anesthesia is used in fetal surgery on children as young as 18 weeks gestation,[45] the earlier time medicine can presently perform fetal surgery.

(c) Non Myelinated Nerve Fibers Transmit Pain.

The old assumptions adopted in 1973 about the child's ability to feel pain were simply wrong. The assumptions the neonates could not feel pain, that mylineated nerve fibers were necessary for pain perception, that pain experience required pain detecting nerves connected to the tholanerves end them the brain cortex, and a permit of cortical maturation were in error. They were based upon gross histological observation with no knowledge of neuropeptides, their detection and formation, without the benefit of modern

[43] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[44] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[45] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

methodologies and technologies developed in the last decade.[46] It is now clear that a child is capable of experiencing pain as early as six to eleven weeks after conception.[47]

II. A WOMAN'S RIGHT MUST REFLECT AND PROTECT HER TRUE INTERESTS AND ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING AND SHE IS A MOTHER WHOSE MOST IMPORTANT PERSONAL INTERESTS ARE COMPATIBLE WITH HER CHILD'S INTEREST IN LIFE.

A. NATURE AND SCOPE OF THE MOTHER'S REAL INTERESTS.

The most obvious implication of the new scientific and medical information which supports the conclusion that the life of a child begins at conception is that the child has a personal interest in life, an interest never before specifically identified or weighed by this Court which requires recognition of a corresponding natural and inalienable right to life of the child.[48] The fact of the child's human existence has equally profound implications for the interests of a woman carrying her child in utero.

Roe identified what it perceived to be a woman's interests the court sought to protect. However, the newly obtained scientific data concerning the child's humanity and the information about the

[46] See Loce pet. p. 14-16; see also, amicus brief of World Federation of Doctors.

[47] See Loce pet. p. 21-30; see also amicus brief of World Federation of Doctors.

[48] These petitioners adopt and incorporate those arguments on the child's rights found in the Loce Pet., Pt. II at p. 30-40.

substantial harm to women due to abortion, now available, reveal that identification of a woman's protectible interests by *Roe* was materially deficient. Because it is the existence, nature, and "protectibility" of any of these interests which constitute the necessary basis for a right, their proper identification is critical.

The *Roe* Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. The first, judgments when a mother's life is in danger is not implicated in this case.[49] The other concerns listed by *Roe* are: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe*, at 153. These may be concerns that implicate the right of privacy, but they only concern decisions before a woman becomes a mother. New Jersey does not have a compelling interest to interfere with the decision of a couple concerning conception. *Griswold v. Conn.*, 381 U.S. 479 (1965). However, once a mother conceives and her child is in

[49] In this case it was stipulated by the state that the mother's life was not in danger and conception was the result of consensual relations between a couple engaged to be married. Therefore, there is no need to address this interest of a woman in this criminal prosecution of Mr. Loce.

existence her personal interests are quite different.

Even if it were perceived that a woman, or couple had an "interest" in avoiding the obligations of parenthood even after the child comes into existence, those "interests" could never be protectible in a constitutional sense. It is not sufficient that one merely state a "need," a desire, or have some expectations. There must be a legitimate claim of entitlement for which there is an independent source. It is the underlying nature of the "interest" which must be examined. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-483 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Montanye v. Haynes*, 427 U.S. 236, 242 (1976). *In Roth, supra*, this court explained:

> ...the range of interests protected .. is not infinite ... We must look to see if the interest is within the Fourteenth Amendments' protection of liberty... 408 U.S. at 569, 571.

The determining factor is the underlying nature of the precise interest, not that there is a "grievous loss", but an interest of the protectible kind. *Morrissey v. Brewer, supra*, at 481; *Board of Regents v. Roth, supra*, at 569-574. The interest must have a source in law to be protectible. *Meachum v. Fano, supra*, 224-227; *Montanye v. Haynes, supra*, 242.

The true nature of a woman's interest must be scrutinized in view of the fact of the child's existence and the harms to a mother which have come to light during two decades of experimentation with abortion. No matter which rhetoric is used to characterize a mother's or couples "interest" to avoid the obligations of parenthood once the child is in existence, the "interest" [in "abortion" or "choice"] is, in fact, an "interest" in terminating the life of a human being, a child. The interests found in *Roe* no more justify terminating the life of the child before birth then they would if a parent took the life of an infant two days after birth to avoid the stress of child rearing. *See, Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting).[50]

[50] If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself. See IIC & IID below.

Casey elaborates on the concern pertaining to maternity:

> "The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute

When a woman or a couple conceive the interests listed in *Roe* are no longer irrelevant. The key difference is the fact that the child exists. Even if a mother claimed an interest in terminating her child's life, it is not protectible because it is perfectly repugnant to her traditionally recognized and protectible interests including her interests in her child's actual life, and her relationship with the child [see, IIC and IID below].

B. Identifying the Real Nature of the Life in Question.

The fact that the child is a human being is pertinent to the interests of the mother. The *Roe* court's stated inability to determine when the life of the child began impaired its ability to accurately identify the true interests of the critical participants. As a result, ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest" and those of the mother. The Court most

form. *Casey* recognized that the responsibility for the avoidance of this experience, if desired, rests upon the mother before they are realized. The same reasoning applies before conception. 112 S.Ct. at 2817.

often refers to the child as "potential life" and the state's interests as one in 'potential life'. *See, e.g., Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).[51] Nowhere is this failure and uncertainty more apparent than in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; *and depending on one's beliefs, for the life or potential life that is aborted. Casey*, 505 U.S. ___, 112 S.Ct. at 2807 (emphasis added).

This reflects the failure of the Court to reach a conclusion concerning the nature of the life. Either this is a human being or it is not. It is not a "belief", religious or otherwise. It is a matter of fact. This determination affects the nature of a mother's right. If

[51] In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

she is killing her own child or not is material, if not decisive.

C. Once a Woman Conceives and her Child Exists her Personal Interests are Consistent with the Interests of her Child.

Once a woman conceives she has at least seven interests not identified in *Roe*, none of which are inconsistent with her child's interest in life, and all conflict with the *Roe* "interests." The first three, although distinct, are closely related. First, she has a personal interest in her protected relationship with her child. Second, she has a personal interest in the child's life. Third, she has an interest in defending and protecting her child's rights. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kraemer*, 455 U.S. 745 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978); *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988); *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986). The fact that the child is a human being distinguishes two separate sets of interests: those which form the basis for her fundamental right to the companionship with her child — and those which form the basis for her *Griswold* rights. Her relationship with her child exists and is protected during pregnancy. C.F. *Lehr, supra*. No government could demand she terminate that relationship without due process. *Santosky, supra*. The nature of this right is to preserve the life of the child and their relationship. It is not possible that her companionship interest,

because of its nature, entitles her to terminate the child's life because the existence and preservation of that right hinges on the child's welfare.[52] A mother's relationship with her child during pregnancy is the most intimate, most unique, most important, and one most worthy of protection. Although the mother and child are

[52] The nature of the mother's right to the protection of her relationship with her child is best understood by examining the constitutional principles concerning the termination of those protected rights. Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the particular parent possesses a constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, supra. A natural father is not always recognized as having a constitutionally protected relationship. *See Quilloin v. Walcott*, supra; *Lehr v. Robertson*, supra; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right:

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson, supra*. In *Quilloin, Lehr* and *Michael H.* however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a parent's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

two separate persons their relationship is so intimate that the unique bond between them, beginning as it does in utero,[53] creates a human relationship which may be the most rewarding in the human experience. Preservation of the benefits, beauty, and joy of that relationship is one of the greatest interests a woman possesses in all of life.

The fact that she is the parent who carries the baby clearly distinguishes her circumstance (and her role in reproduction) from

[53] Recent studies demonstrate that a mother's bond with her child [and the child's attachment to her] begins during pregnancy and even at its early stages. Klaus and Kennel, "The Family During Pregnancy," in *Parent Infant Bonding*, 1-2 (1982); Lumely, "Attitudes to the Fetus Among Primagravidae," *Australian Pediatric J.*, 106, 108 (1982). Breaking this bond by abortion is detrimental to the health of the mother. See, Ortof, Edna, "Psychological Aspects of Abortion" in *Psychological Aspects of Pregnancy, Birthing and Bonding*, Blum, Barbara L., New York: Human Sciences Press (1980). This unique mother-child relationship, with the developing bond and attachment benefits both the child and mother. Klaus and Kennell, at 3. While at the same time the bond helps the mother to transfer her interest from herself to her child, and therefore prepares her for her unique role in the child's life. Sugarman, "Parental Influences in Material Infant Attachment," 47 *Am. J. Orthopsychiatry* 407 (1977). This accounts for the fact that a mother is the principle attachment figure for a child. Bowlby, "Attachment and Loss," Vol. I *Attachment*, at 304 (1969).

Studies have demonstrated the subjective and conscious awareness that mothers have concerning their bonding with their children during pregnancy. In the second trimester 63% of women expressed attachment with the child and 92% expressed such attachment during the third trimester. Some women even expressed the attachment during the first trimester. Lumely, "Attitudes to the Fetus Among Primagranides" *Australian Pediatric J.*, 106, 108 (1982). Mothers talk to the fetus and stroke it. Id. at 109. The ability of the mother to make a correct assessment of the size, shape and movement of the baby increased as the pregnancy proceeds as does the sense of the separateness of the baby. Id. at 108. Increased sensitivity to the child follows experience of "quickening" when women can feel the baby move. Klaus and Kennell, *supra*, at 13; Leister, "Physiological Effects of Motherhood," at 76 (1980).

that of the father. But the fact that her contributions are different from (and at this age of the child, greater than) his do not make her interest inconsistent with those of the child. If anything, it creates the cherished right to protection of their relationship.[54] The fact that the mother is the parent who carries the child has always been considered material to her rights following birth when she is competing for custody. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter of Baby M*, 537 A.2d 1227, 1261 (1988). Therefore, the fact that a mother carries the child physically relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights.[55] The

[54] The New Jersey Supreme Court has observed, concerning the mother's relationship with the baby she carries: "...we think it is expecting something well beyond normal human capabilities to suggest that [a] mother should [part] with her newly born infant without a struggle. Other than survival, what stronger force is there? ***Matter of Baby M***, 109 N.J. at 459.

[55] This court's opinion in ***Southeastern Pa. v. Casey, supra***, is not inconsistent with this understanding of the mother's interests because *Casey* never addressed the humanity of the child. *Casey* only examines the question of whether a father

fact that a mother wants to kill her own child would be a basis for terminating her constitutional rights and inconsistent with her interest in protecting her child's life. The privacy right to preserve the mother-child relationship child cannot co-exist with the right to kill the child. They are repugnant.[56]

may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. A father never has an interest in an abortion, so his permission could never be required. His *only* interest is in preserving the child's life and their relationship. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights and is the result of this Court never having determined when the life of the child begins. (See footnote 52 above).

[56] The fact that a mother's interests in her child's life and her relationship with the child prior to birth are repugnant to a perceived "interest" in killing the child [and therefore mutually exclusive] through abortion is reflected in some modern feminist literature. In her book, *Sacred Bond*, Times Books, Random House, Inc., New York, 1st ed., 1988, Phyllis Chesler observed this conflict, stating that the "sacred bond" of a mother and child cannot be sacrificed for a right to destroy that relationship.

> Some feminists say: "If women can't do what they want with their bodies, then we'll lose our right to abortion and pay equity." I hope not, but must women give up the right to keep our children -- a right we don't yet have -- for the right not to bear children?
>
> Some feminists say: "Patriarchal motherhood has enslaved and destroyed women-who in turn have emotionally wounded their own children. There's nothing sacred about biological reproduction or motherhood. They're examples of devalued and alienated unpaid labor. Let's organize for wages and better working conditions and get men involved in mothering. At the very least, male mothers will upgrade women's status as childcare workers."
>
> *Perhaps, but how can we deny that women have a profound and everlasting bond with the children they've birthed; that this bond begins in utero; that it is further strengthened by the experience of childbirth, breast-feeding and primary childcare, and by the socialization into motherhood that women (not men) receive?*
>
> *How can we deny that children bond with their birth mothers in utero*, and that children suffer terribly in all kinds of ways when this bond is prematurely or abruptly terminated?
>
> Acknowledging these truths does not doom women to the status of surrogate

Fourth, she has an interest to avoid the risk of physical and psychological harms to which she is subjected when abortion is used to satisfy interests that may have existed only before she becomes a mother. This nation's experimentation with abortion has revealed impressive evidence of profound risk of physical and psychological harms to which a mother is subjected when she acts against her interests by taking her child's life. This method of the destruction of the mother-child relationship places a woman at substantially increased risk for breast cancer. The first uninterrupted pregnancy causes a sequence of hormonal changes which permanently alter the cell structure of the women's breast. During the first full pregnancy, the breast changes from an immature organ to one which is fully functional. Abortion of a first pregnancy interrupts the transformation within the breast. Indeed, abortion terminates this process, leaving millions of breast cells suspended in transitional states where they face exceptionally high risks of turning cancerous.[57] In addition, abortion places women

uteruses-or men to the status of sperm donors. Patriarchal "civilization" has already done so. *Sacred Bond*, at 22-23. [Emphasis added.]

[57] See: Russo, J., Russo IH (1980) "Susceptibility of the Mammary Gland to Carcino-genesis II. Pregnancy Interruption as a Risk Factor in Tumor Incidence" *Am J Pathol*, 100:497-451; Ownby, H.E., et als. (1983) "Interrupted Pregnancy as an Indicator of Poor Prognosis in TI, 2, No, Mo Primary Breast Cancer" *Breast*

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[65] Reardon, *Aborted Women - Silent No More,* Chicago: Loyola University Press, 1987; Franache, *The Ambivalence of Abortion,* New York, Random House, 1978; Speckhard, H. (1987), *Psycho-Social Stress Following Abortion,* Kansas City, MO: Sheed & Ward.

[66] Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" Omega 18:1 (1987), 1-12; Reardon, *Aborted Women - Silent No More, supra;* Reardon, "Criteria for Identification of High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 Aborted Women," supra; Bowlby, J., *Attachment and Loss,* London: Hogarth Press (1980); Harris, Betty G., "Induced Abortion" in *Parental Loss of a Child,* ed Rando, Theresa A., Champaign, Ill: Research Press Co., (1986); Kuenning, Delores, "'I Killed My Baby' The Emotional Aftermath of Abortion" in *Helping People Through Grief, When a Friend Needs You,* Bethany House Publishers, Minneapolis (1987); Upton, Julia "Hidden Grief of Abortions" in *Pastoral Psychology,* 31(1): 19-25, Fall (1982); Shoor, M. et al., "Delinquency as a Manifestation of the Mourning Process" in *Psychiatric Quarterly,* 37:540-558.

disorders;[67] [11] and other physical and psychological injuries too numerous to detail.[68] Fifth, she has an interest in preserving her personal dignity in her role as mother, a role that does not simply "ennoble" her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries. A legal policy which denigrates her role in carrying her child is not one which actually protects her interests but destroys them. There is a difference between the experiences of women and men in the role of reproduction that must be accounted for to define a women's true interests.[69] The insistence by society that

[67] Ashton, J. (1980) "The Psychosocial Outcome of Induced Abortion," in *British Journal of Obstetrics & Gynecology,* 87, 1115-1622; Akron Pregnancy Service, supra; Freemard, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions," in *Obstetrics & Gynecology,* 55, 5, 625-635.

[68] Many of these harms are inherent to abortion or the breaking of the mother-child bond developed during pregnancy, such as the grief reactions in abortion (so characteristic to birth mother separated from their children after birth). See, generally, Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12; the other injuries cited above are inherent in the abortion conduct because it acts against the natural interests of the mother. The study in two Canadian provinces which found that 25% of "aborted" women made visits to psychiatrists as compared to 3% of the control group is typical. See, Badgley, et als. (1977) Report of the Committee on the Operation of the Abortion Law, *Ottowa: Supply and Services*, 313-321.

[69] A woman's sense of personhood is most often grounded in her relatedness to others. Women tend to find satisfaction, pleasure, effectiveness and a sense of worth if they experience their life activities relating to a sense of connection with others. This sense of connection leads to an increase in vitality, aliveness and energy. Women also have a heightened sense of empathy and this ability enhances rather then diminishes them. Miller, *New Physiology of Women* (1986). Women tend to focus more on their relationships to others. These chracteristics

women conform in their conduct in the ways expected of men ignores and denigrates the experience of the mother during pregnancy.[70] To pretend that she can deny her true experience to meet these expectations is not only insulting but cruel. To establish a formal policy which chooses to protect the destruction of her relationship with her child instead of a policy which clearly protects it is a denigration of women, because a policy which infers it is a distressing experience to be a mother is a statement that it is bad to be a woman.

Sixth, she has an interest in not being exploited by societal pressures which destroy her interests as mother as a method to

are associated with her bonding and reproductive functions. Blenesky, Clinchy, Goldberger and Tarule, *Women's Ways of Knowing*, at 1-7 (1986). Gilligan, *In a Different Voice*, at 23 (1982), writes that the elusive mystery of women's development lies in its recognition of the continuing importance that attachment has in the human life cycle. Gilligan, supra, at 9-10, noted that there are differences in the ways men and women define themselves in relationship to others. Women seem more comfortable speaking of the relationships that sustain them. Thus the emphasis on relationship found in women will tend to enhance bonding, while the emphasis on separation and independence in men will tend to minimize the importance of bonding.

[70] A male dominated society prized autonomy and independence; the goal of development was total independence. Women's development and role as mother often did not follow this trajectory. Miller, *What do We Mean by Relationships*, 22 Work in Progress, Stone Center, Wellesly College 1, 16 (1986). The mother's bonding process and her experience being different from that of men must be accounted for. See, Miller, *New Psychology of Women*, at 140 (1986). See Hoeissman, M. et al., "Sex Differences and the Epidemiology of Depression" in *Archives of General Psychiatry*, 34: 98-111 (1977).

satisfy the interests of third parties, including the State, the father,[71] and others, who may have personal interests inconsistent with those of mother and child. Abortion is an exploitation of women. It treats the mother as if she is not a whole woman. It assumes she can be sexually exploited and act as though she is not, in fact, a mother. It demands that she detach herself from her experience and her bond, love, and sense of duty to herself and her child.[72] It expects a mother to prevent the bonding process despite the fact that this natural process is both

[71] Many abortions are at the urging of the father who does not have to live with the experience of pregnancy, bonding, love of child, and abortion. See studies of abortions as result of pressure from the father, Shostak, A., et al., *Men and Abortion, Lessons, Losses and Love*, New York, Proejen, (198); Lien-Mak, F., et al., "Husbands of Abortion Applicants: A Comparison with Husbands of Women Who Complete Their Pregnancies" in *Social Psychiatry* 14:59-64 (1979) [the authors of this Hong Kong study warns "our study has served to emphasize the important role that the husband plays in abortion seeking ... it is high-time [to] give substance to the shadowy figure [of] the male partner"]; See also, Rue, V., "Abortion in Relationship Context" in *International Review of Natural Family Planning* 9:95-121 (1985) (abortion serves the purpose of the erotic complulsive male who seeks self-esteem through sexual "achievement").

[72] Feminists who oppose abortion see it as a male institution which encourages and even forces a woman to act irresponsibly, against her self-interest, her dignity and self-worth, just as men often do in reducing women as "sport" and "entertainment." Newman, B., "Why Post-Modern Patriarchy Loves Abortion," in *Sisterlife,* (1993) Vol. XIII, 1, p.1, 5; Some of the greatest feminist leaders, such as Susan B. Anthony, deplored abortion as an exploitation of women, calling it "child murder," [The Revolution, 4(1):4 (July 8, 1869)] and the result of the use of women as sport [Anthony, Marriage and Maternity," *The Revolution,* 4 (1)4, 1869].

psychological and physiological.[73] It *uses* the mother as a sexual object without regard for the harm abortion can cause her.[74] It allocates all of the risk, guilt, physiological and physical pain to her and further isolates her in her distress in circumstance of an unplanned or imprudent pregnancy by placing the responsibility of killing her child entirely upon her.[75]

Perhaps worst of all is the fact that a mother is deprived of any meaningful consent to the destruction of her cherished and sacred relationship with her child. In circumstances where mothers express their intentions during pregnancy to terminate their relationships with their children, no state permits enforcement of

[73] "Men tend to take abortion lightly; they...fail to realize the values involved. The woman who has recourse to abortion is disowning feminine values, her values...Women learn to believe no longer in what men say...the one thing they are sure of is the rifled and bleeding womb, these shreds of crimson life, this child that is not here." Simone deBeauvoir, *The Second Sex*, 1952; "Abortion is violence: a deep, desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more pervasive and prevalent violence, the violence of rapism." Adrienne Rich, *Of Women Born*, 1976.

[74] "It is typical of the contradictions that break women's hearts that when they avail themselves of their fragile right to abortion they often, even usually, went with grief and humiliation to carry out a painful duty that was presented to them as a privilege. Abortion is the latest in a long line of non-choices that begin at the very beginning with the time and the place and the manner of lovemaking..." Germaine Greer, *The New Republic*, interview, October 5, 1992.

[75] See discussion of psychiatric harm above. Dr. Alice Ruben Stockharm wrote of this isolation. See, Stockharm, A., *Takology* (1887), p. 247.

a mother's oral *or written statement to surrender her child until* after birth because, in every instance, regardless of the counseling, her decision, before actual birth, is uninformed. The New Jersey Supreme Court has found that any promise or decision by a mother to terminate her relationship with her child made before birth is uninformed as a matter of law. *Matter of Baby M*, 537 A.2d 1227, 1248. That court has made it clear that when it comes to the cherished relationship between a mother and her child, during pregnancy, no consent concerning the termination of that relationship can be recognized: that there are in a civilized society some relationships too important, too sacred, for that society to impose its collective power to assist in the destruction of that relationship, regardless of the beliefs of a mother in a moment of crisis or vulnerability. *Matter of Baby M*, 537 A.2d at 1249-1250. If that is true where a mother gives birth, it is more so where she irrevocably kills her own child and must live with the consequences.[76] Abortion also fails to recognize the reality that most women who originally intend to surrender children to adoption (be-

[76] When a woman is in crisis her "consent" is invariably "uninformed" in any true sense. C.f. Hardison, J.E., "Uniformed Consent and Terms Within Definitions," in *American Journal of Medicine*, 74:923-933 (1983).

cause of the *Roe* "interests") change their mind. Abortion is repugnant to every policy that New Jersey has adopted to protect and preserve a mother's relationship with her child-policies created to protect her interests as well as the child's.[77]

Seventh, she has an interest in having the law extend to her dignity and respect by recognizing that she is capable of living with dignity in the family, commercial and professional life of this nation without being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot be happy in life without an exclusive "right" to terminate the life of her own child.

D. THE INTERESTS THAT HAVE ENJOYED TRADITIONAL PROTECTION ARE THE CHILD'S INTEREST IN LIFE, AND WELFARE, AND A MOTHER'S INTEREST IN PROTECTING BOTH THE LIFE OF HER CHILD AND HER RELATIONSHIP WITH HER CHILD. THE LAW AND TRADITIONS OF NEW JERSEY AND THIS NATION HAVE NEVER RECOGNIZED AS PROTECTIBLE A MOTHER'S "INTEREST" TO TERMINATE THE LIFE OF HER CHILD—AN "INTEREST" COMPLETELY OPPOSED TO THE BASIC FABRIC OF ALL LAW PROTECTING MOTHER'S AND THEIR CHILDREN, AND THE VERY FUNCTION OF GOVERNMENT ITSELF.

Once the fact of the child's existence is recognized, a perceived

[77] All of these harms that befall the mother is actually done to accommodate society's sexual exploitation because it was easier for that society to create an industry of abortion than to correct the underlying exploitive conduct that results in unplanned pregnancy.

"interest" one may assert to terminate the life of a child, at any age of development, cannot be an interest protectible under the due process clause of the Fourteenth Amendment because: [1] all established law and tradition protects the child, and a mother's relationship with her child; [2] taking the life of the child is completely opposed to the fundamental policies and purposes of those traditional protections—protections that form the core of all civilized society; and [3] a destruction of the protections of the actual life of a child and a mother's relationship with her child is a violation of the basic purposes for which government was established.

1. The Traditional Protection of the Child.

One of the greatest and most important functions served by the state is the protection it has traditionally provided the children within its borders. In its exercise of its *parens patriae* jurisdiction, New Jersey has traditionally protected the family unit, and its continued maintenance to advance the welfare of children. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986); *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A.2d 1227 (1988).

When, however, a family separates, the overriding interest is the welfare of the child, so that a custody dispute is resolved based upon the child's best interests. *Fantony v. Fantony*, 122 A.2d 593

(1956). Even when the fundamental constitutional right of a parent to the companionship of her child is threatened by termination of all parental rights, the ultimate question is harm to a child, so if there is likely harm of a certain magnitude those rights will be terminated. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. 1986).

This focus upon the welfare of a child, even when the traditionally protectible rights of parents are terminated, is consistent with the opinions of this Court which have scrutinized state terminations of parental rights protected by the Fourteenth Amendment. *Santosky v. Kraemer*, 455 U.S. 745 (1982); See, and compare, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Stanley v. Illinois*, 405 U.S. 645 (1972) [see n 52 above]. An alleged "interest" of a parent to harm, or which is harmful to, a child, is simply not part of the protected parental rights under the Due Process Clause of the Fourteenth Amendment.

Traditionally, New Jersey protects children even during pregnancy, under its *parens patriae* jurisdiction, against a parents' conduct which threatens the child's life. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (1964).

Indeed, New Jersey traditionally recognized that a child's life

begins at conception and the child enjoys the right to live, prior to birth, under the state constitution. The child's actual existence from conception was recognized in *Smith v. Brennan*, at 157 A.2d 497, 501-503 (1960):

> ...a child is in existence from the moment of conception and not merely a part of its mother's body. 31 N.J. at 362. It is clear ...that before birth an infant is a distinct [human being] and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth. 31 N.J. at 364.

In *Raleigh Fitkin, supra*, New Jersey found that the child's rights were personal to the child, and, as a separate human being, the court appointed a guardian ad litem. 201 A.2d at 538. This holding reflects the child's constitutional right to life under Art. I, Sec. I of the state constitution:

> The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor..it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life... *Gleitman v. Cosgrove*, 227 A.2d 689, 693-694 (1967).

Even after Roe was decided, the New Jersey Supreme court reaffirmed the child's constitutional right to live prior to birth under the state constitution and the state's policy of protecting life:

> One of the most deeply held beliefs of our society is that life...is more precious than nonlife (citation omitted)...concrete manifestations of this belief are not difficult to discovery. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The Federal

> Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law...our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), ART. 1, SEC. 1. The declaration of independence states that the primacy of man's *'inalienable' right to life is a 'self-evident truth.'* Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped beings. *Berman v. Allan*, 404 A.2d 8, 13 (1979) (emphasis added).

As recently as 1992 the New Jersey Supreme Court reaffirmed that portion of *Gleitman, supra*, which held that the state constitution extends a right to live to children prior to birth:

> In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' (citation omitted) and found that, '[e]ugenic considerations are not controlling,' ibid., noting that considerations of financial burden to the father and convenience of the mother *did not outweigh the child's right to live, albeit imperfectly.*" *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J. 1992). (emphasis added)

2. The Traditional Protection of a Mother's Relationship with Her Child.

New Jersey has a strong and long standing policy to protect a mother's relationship with her child during pregnancy,[78] which protects against the destruction of the mother's relationship with her child and the exploitation of the mother during pregnancy. The fundamental policy of New Jersey's adoption laws is to preserve

[78] The deep rooted respect for this relationship is found in western literature replete with statements that recognize that this relationship is at the heart of an ordered culture. It is "the nearest and dearest" known to mankind. Aeschylus, "Eumnides" translated by George Thompson, Greek Play's in Modern Translation (Dudley, Fitts, ed. 1947) at 130.

the relationship of a mother and child during and after pregnancy and protect it against exploitation and undue influences. *Sees v. Baber,* 377 A.2d 628 (1977); *Matter of Baby M,* 537 A.2d at 1248-1250; *A.L. v. P.A.*, 517 A.2d 171 (A. D. 1986). Likewise New Jersey protects a mother's relationship with her child from exploitation, pressures and inducements of surrogate contracting arrangements even when she had promised to conceive and carry a child for another couple, and terminate her relationship after birth. *Matter of Baby M,* at 1248-1250. This protection is based upon the long standing policies which protected the mother's relationship even after her promises, made before or during pregnancy, to surrender her relationship, whether it be to adoption or under the terms of a surrogacy arrangement. New Jersey refuses to enforce such a promise because a decision by a mother to terminate her relationship with her child, made during pregnancy, regardless of counseling, is uninformed as a matter of law. *Matter of Baby M,* at 1248.

When parents are separated at a child's birth, and they disagree on custody, New Jersey's strong commitment to preservation of the mother's relationship requires that the child must initially be left in the custody of the mother (if she desires it) unless there is

a clear showing that the child will be harmed because the mother is unfit. Id., at 1261. This policy is based upon the recognition that the interests of a mother and her child are the same in their mutual need to further nurture their relationship. Id. at 1261. In short the relationship between a mother and her child, at every stage of development of the child, is the most cherished and best protected in all of the human experience. The New Jersey laws against abortion were designed to protect the mother's interests as well as the child's. See, *N.J. v. Novak*, 121 A.2d 521 (1956); *N.J. v. Siciliano*, 117 A.2d 490 (1956); *N.J. v. Colmer*, 122 A.2d 325 (A.D. 1957); N.J.S.A. 2A-87-1.

The relationship and benefits a mother derives from it are too important, too sacred to destroy it at all, but especially where it is destroyed in crisis, under pressure, by inducement or threat, or in the circumstance where it is impossible for her to truly appreciate the nature of her act. Any method of termination of a mother's relationship with her child before birth is contrary to all existing law and policy in New Jersey.[79]

[79] In *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983), the interest of a mother in her child's relationship was eloquently described:

"[the law protects] the profound importance of the bond between a parent and child to the emotional life of each. *Frequently each party to the relationshp*

3. An "Interest" of a Mother to Terminate Her Child's Life is Unprotectible.

An "interest" of a mother to terminate the actual life of her child has no source in law or the traditions of this nation and therefore not protected by the Due Process Clause. See, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-483 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Ruckalhaus v. Monsanto Co.*, 467 U.S. 986, 1001-1003 (1984); *Codd v. Velger*, 429 U.S. 624, 628 (1977); *Ingrahm v. Wright*, 430 U.S. 651, 672-673 (1977); *Webb's Fab. Phar., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Smith v. organ. of Foster Fam.*, 431 U.S. 816, 838-847; 858-863 (1977).

The "interest" of a mother in terminating her child's life is not merely without "an independent" source, it is directly opposed to all of the interests of a mother and child which have always enjoyed protection. The repugnant nature of this "interest" precludes it as "protectable" because, by necessity, it destroys the natural right to life of the child and the fundamental rights of the mother

depends heavily on his ties with the other for his sense of self-worth, for his very self-definition. To rephrase the point in the language of entitlement, the parents right to the preservation of his relationship with his child *derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring.*" 707 F.2d at 599 (emphasis added).

in their relationship. *Smith v. Organ. of Fos. Fam.*, 431 U.S. at 846. In *Smith*, the majority observed that for one to have a recognized liberty interest, it cannot operate to "derogat[e]" the substantive Due Process right of another. 431 U.S. at 846. (See also, concurring opinion of Justice Stewart, 431 U.S. at 856-863).

Neither *Roe* nor *Casey*, although protecting an "interest" in abortion, recognized an interest in actually killing a child.[80] A government which expressly authorizes or participates in the termination of a child's life has failed to perform the legitimate function for which it is created. The purpose and duty of the government is to protect its people and the life of all within its jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885) [see Loce Pet. Pt. II].

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the collective interests of the individuals for whom it ex-

[80] Even if such an interest were "protectible", which it cannot be, it could never outweigh the child's right to live. See and compare, *Zacchini v. Scipps - Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

ists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go. If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life—she is the trustee of it.

III. CONVICTION OF PETITIONERS CHADWICK, KRAIL, SMOLDORE AND HENDERSON IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS OF THE CHILD AND THEIR OWN RIGHTS TO THE EQUAL PROTECTION OF THE LAW.

These petitioners have the standing to raise the rights of Mr.

Loce's child. "Standing" is an element of the "adverse parties" requirement of Article III and concerns whether the party seeking relief has:

> Alleged such a personal status in the outcome of the controversy as to assure that concrete adverseness which sharpens the preservation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This Court has often recognized the standing of a litigant to prosecute the rights of another if the litigant demonstrates: [1] a degree of injury to herself, and [2] that, under the circumstances present, the injured parties whom they seek to represent would probably be unable to assert their own rights. See e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Craig v. Boren*, 429 U.S. 190, 192-197 (1976); *Carey v. Population Services Intl.*, 431 U.S. 678, 682-684 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The policy underlying these requirements was best stated in *Singleton v. Wulff*, 428 U.S. 106 (1976). With respect to the first requirement *Singleton* states:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least

> can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. 428 U.S. at 114, 115.

Here petitioners sought to protect the child's life, the defense of which is the very core of the child's right in question. It matters not that they were prosecuted under a trespass statute: the Appellate Divsiion found that the activity in which they engaged was the direct act of preventing the death of the child. They were convicted for preventing the "abortion". The Appellate Division stated that its refusal to recognize petitioners' otherwise valid defenses was the Appellate Division's effort to protect the mother's conduct in terminating the child's life. [A-87, 88]. The state's act of removing the petitioners from the clinic was to allow the termination of the child's life. The petitioners had stopped the termination until the state intervened. All of the states actions, the removal of the petitioners from the clinic, their prosecution and conviction, was for the sole purpose of advancing and protecting "the mother's right" to kill the child [A-87, 88]. The harm to petitioners which satisfies the first requirement of *Singleton* is obvious in petitioners' conviction for protecting the child. The

second requirement of *Singleton* is totally satisfied. Unlike every other case decided by this Court, if standing is not recognized in the petitioners (or other persons similarly situated) then the rights of this class of children could never be raised. The parties whose rights are sought to be protected must rely on others to prosecute their rights.

As Singleton points out, one of the reasons for the standing requirement is that the third parties [the possessors of the rights in question]:

> Usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. 428 U.S. at 114

So the effectiveness of the petitioners as advocates of the child's rights is a factor. However, here the court does not have the luxury of holding out for the third parties as the *most effective* advocates, because the children always depend upon someone in the position of the petitioners to litigate their rights for them. The question then is not if petitioners are the *best advocates*, but whether they are effective. Their personal harm, and the fact their activity directly involves the act of protecting the child's rights, renders them effective. However, their unique personal status as four women who have been harmed by abortion brings an insight

concerning the true interests of women and abortion as an exploitation of women that is absent without their litigating the child's rights. They may be the *most effective advocates* of the child's rights because of their sensitivity to and understanding of the relationship between mother and child and the harm to women when this relationship is destroyed.

This Court has never held that a defendant in a prosecution cannot raise the rights of another even if the possessors of the right are capable of litigating their rights, and even where others (such as Mr. Loce) were in the same case also prosecuting the rights of the third party. Only a showing that the child's rights would be adversely affected, not entirely denied, is sufficient for an acquittal of the petitioners. The harm to petitioners (conviction) and the total denial of the child's rights are sufficient.

In *Singleton, supra*, a doctor was *merely threatened* with the loss of money, and the persons whose rights he sought to protect were capable of litigating their own rights. The mere "chilling" of the women's ability to assert their right was sufficient infringement to condemn the State's action. In *Doe v. Bolton*, 440 U.S. 179 (1973) a Georgia statute which *merely threatened* prosecution of a doctor was declared by the Court to be an unconstitutional

infringement of a "patient's" rights despite the fact that [1] the doctor was not himself prosecuted, and [2] pregnant women were themselves parties to the very action. The combination of the mere threat of prosecution to the doctor combined with mere "restriction" of the women's rights rendered the statute against the doctor unconstitutional. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the prosecution of the Executive Director and Medical Director of a clinic was declared to be an unconstitutional deprivation of the privacy rights of couples. This Court, in short, has held that if a state's interest intrudes upon or violates an individual fundamental right it cannot form the basis of a criminal conviction. By removing petitioners from the premises and charging them with trespass the State acted in violation of the child's rights and impermissibly interfered with their own right to equal protection of the law.[81] The prosecution of petitioners therefore, operating as

[81] Refusal to recognize the petitioners' standing to raise the child's rights would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. New Jersey extends the defense of a defendant's act as being necessary to defend the life of others in every other instance, and the conviction of the Krail petitioners is solely based upon the classification of persons only on their status as "unborn". See affirmative defenses for protecting other persons under *N.J.S.A.* 2C:3-5; *N.J.S.A.* 2C:32-2; *N.J.S.A.* 2C:3-10; *N.J.S.A.* 2C:30-8; and *New Jersey State Constitution Article 1, Section.1* (right to defend life). See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

a complete bar to the assertion of the child's rights is clearly an unconstitutional deprivation of those rights. These petitioners, it should be noted, acted in concert with the child's father, at his request, and he could not have protected the child's life without their help. Petitioners' standing and those of Loce are interwoven and the considerations unique to Mr. Loce by virtue of his relationship with the child support the standing of petitioners Chadwick, Krail, Smoldore and Henderson. [See, Loce Pet. pt. IV]. If this Court recognizes the standing of doctors who assist in terminating the life of children, then clearly the Court, by the same principles of law, must recognize the standing of petitioners who aid a father to protect and defend the child's life.

CONCLUSION

The issues presented by this petition have never been directly decided by this court. The public importance of the issues requires that the court grant certiorari to decide them.

RICHARD COLLIER, ESQ.

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RICHARD TRAYNOR, ESQ.

Supreme Court, U.S.
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No. 93-1148
No. 93-1149

In the Supreme Court of the United States
October Term, 1993

ALEXANDER LOCE,
Petitioner,
vs.

THE STATE OF NEW JERSEY,
Respondent.

TINA KRAIL, LORI CHADWICK, DEBORAH SMOLDORE AND JEANNIE HENDERSON,
Petitioners,
vs.

THE STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

---

Brief of Respondent in Opposition to Petition for Writ of Certiorari

---

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QUESTION PRESENTED

Does the federal Constitution prevent a State from punishing criminal conduct simply because that conduct is intended to prevent a lawful abortion?

STATEMENT OF THE CASE

On September 8, 1990, petitioners entered a medical facility in Morristown, N.J., where petitioner Alexander Loce's fiancee was to end her eight-week pregnancy. They bound themselves with handcuffs and bicycle locks to block the operating room.

Petitioners were convicted of criminal trespass, N.J.S.A. 2C:18-3, in the Morristown Municipal Court.[1] (A-186 to

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[1] N.J.S.A. 2C:18-3b(1) provides:

> A person commits a petty disorderly persons offense if, knowing that he is not licensed

A-201).[2] Their convictions were affirmed by the Law Division and the Appellate Division. (A-82 to A-108). By Order dated October 19, 1993, the New Jersey Supreme Court denied review. (A-204).

SUMMARY OF ARGUMENT

The federal Constitution does not prevent a State from punishing criminal conduct simply because that conduct is intended to prevent a lawful abortion.

> or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (1) Actual communication to the actor...

[2]A shall refer to petitioner Loce's appendix.

ARGUMENT

PETITIONERS HAVE SHOWN NO SUBSTANTIAL BASIS FOR CERTIORARI.

Petitioners have shown no special and important reason to grant this petition. Therefore, it must be denied. R. 10.1.

This is a criminal-trespass case. It is not an abortion case. It does not involve the issue of when life begins. It does not, as petitioners claim, implicate the equal-protection clause or the due-process clause. Petitioners should not be allowed to twist a simple trespass case into a re-examination of Roe v. Wade, 410 U.S. 113 (1973), reh. den., 410 U.S. 959 (1973).

Petitioners' anti-abortion views do not place them beyond the reach of state criminal law. This is a settled question.

In Bray v. Alexandria Women's Health Clinic, 506 U.S. ___, 113 S.Ct. 753

(1993), this Court noted that the disruption of abortion facilities can be remedied through state criminal law:

> Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises. These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages. (emphasis added)
> Id., at 768.

See also, Wichita v. Tilson, 855 P.2d 911 (Kan. 1993), cert. den., ___ U.S. ___, 114 S.Ct. 468 (1993) (this Court refused to review decision rejecting actor's asserted right to violate state criminal law to prevent abortions).

A woman has a right to a first-trimester abortion. Roe v. Wade, supra. See also, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. ___, 112 S.Ct. 2791 (1992). It defies reason to suggest that an actor may

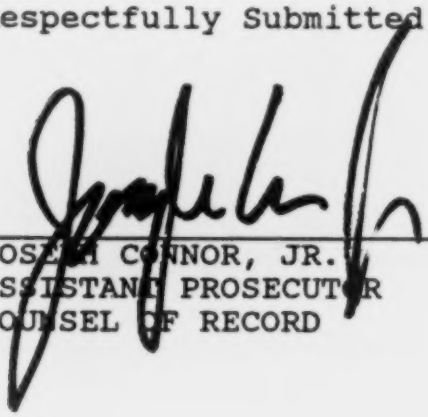
lawfully engage in criminal conduct to prevent the exercise of what has been held to be a woman's right to a first-trimester abortion. This is especially true when the criminal conduct involves a statute unrelated to abortion. To allow activists to challenge long-established precedents by violating a criminal statute unrelated to the issue they seek to raise would be to invite anarchy.

The municipal judge's finding that life begins at conception is dicta. It is irrelevant to the elements of and defenses to criminal trespass. The municipal prosecutor presented no expert testimony. A municipal judge's gratuitous finding, based on such a one-sided record, does not warrant review by this Court. This dicta cannot convert a simple trespass case into a re-examination of Roe v. Wade.

CONCLUSION

Respondent respectfully requests that this petition be denied.

Respectfully Submitted,



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COUNSEL OF RECORD

No. 93-1148 (3)
No. 93-1149 (3)

Supreme Court, U.S.
FILED
JAN 21 1994
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

TINA KRAIL, ET ALS.,

Petitioners,

- against -

THE STATE OF NEW JERSEY,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI TO SUPREME COURT OF NEW JERSEY INTERNATIONAL RIGHT TO LIFE FEDERATION, ET ALS.

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INTERESTS OF AMICI

Each amicus curiae in support of the Petitions for Certiorari has an interest in this case because each exists and acts for the purpose of achieving the recognition and protection of all human beings, whether born or unborn. Many amici are medical, scientific or bio-ethical organizations and all have concluded, and new scientific evidence supports the conclusion, that the unborn child prior to birth is a full, complete and separate human being. The amici curiae who appear in support of the Petitions for Certiorari are: INTERNATIONAL RIGHT TO LIFE FEDERATION ["IRTLF"][1]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE ["WFDRHL"][2];

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[1]IRTLF is an international educational group organized 10 years ago, with its main office in Rome, Italy. IRTLF's main function is to promote education and communication between the various national right to life groups throughout the world. It sponsors two to four international educational congresses annually and has Non-Governmental Organization status in the U.N. and is regularly represented in Geneva, Switzerland on issues pertaining to respect for human life.

[2]This worldwide federation has a membership of 350,000 physicians from 65 nations. It has a constituent membership of 75 groups worldwide. WFDRHL is headquartered in Ostend, Belgium. Its members adhere to the principles that, from the moment of conception, a human being is alive and entirely distinct from the mother who provides nourishment and protection; that each human being is unique and irreplaceable; and that medicine must

ACT RIGHT TO LIFE ASSOCIATION ["ACT"][3]; ACTION LIFE (OTTAWA) INC. ["ALO"][4]; AMERICAN ACADEMY OF MEDICAL ETHICS ["AAME"][5]; ASOCIACION EN DEFENSA DE LA VIDA HUMANA ["ADVH"][6] ASSOCIACAO NACIONAL PRO-VIDA E PRO-FAMILIA ["ANPV"][7]; ASSOCIATION FOR TRAINING & EDUCATION IN NATURAL FAMILY PLANNING ["ATEN"][8]; CANADIAN

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have absolute respect for human life regardless of age, illness, disability or degree of dependence.

[3]ACT is located in Canberra, Australia, and has a membership of 350. It engages in political and educational activities for the protection of human life from conception to natural death.

[4]ALO, formed in 1971 in Ottawa, has 4,000 members and seeks to develop respect for all human life from conception until natural death, through education, publicity and public meetings.

[5]AAME, incorporated in Indiana in 1986, has 22,000 member physicians in all specialties from the U.S. and Canada. It is dedicated to the sanctity and defense of human life from conception until natural death and seeks to return medicine to the original principles of the Hippocratic Oath.

[6]ADVH has 305 members and is located in Seville, Spain. Formed in 1983, its purpose is to oppose abortion in the world and in Spain particularly.

[7]ANPV is headquartered in Brasilia, Brazil and acts to exchange information with similar organizations in Brazil and elsewhere about defending the family and life (from conception).

[8]ATEN is a speakers bureau in Ohio which conducts educational programs in the fields of natural family planning and applied sciences. ATEN believes all human beings are entitled to protection from conception onward.

PHYSICIANS FOR LIFE ["CPL"][9]; CENTER OF STUDY AND RESEARCH FOR NATURAL FERTILITY REGULATION OF THE CATHOLIC UNIVERSITY OF THE SACRED HEART ["CSR"][10]; CHRISTDEMOKRATEN FUR DAS LEBEN ["CDL"][11]; COLUMBAN SISTERS ["CS"][12]; DENTISTS FOR LIFE ["DFL"][13]; DEPARTMENT OF GYNECOLOGY & OBSTETRICS OF THE CATHOLIC UNIVERSITY OF THE SACRED HEART ["DGO"][14];

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[9]CPL, is a Canadian corporation with offices in Ontario, whose membership of about 1,000 physicians from across Canada, believes in the sanctity and defense of human life begining at conception.

[10]CSR, located at the Catholic University of the Sacred Heart in Rome, Italy, works for the defense of human life and to achieve respect for human life beginning at conception.

[11]CDL is an association of politicians, scientists, journalists and educators from throughout Europe who organize discussions and provide political input to achieve the recognition of absolute values, including the inviolability of human life from conception until natural death.

[12]CS, consisting of four members of the Order, and organized in Mokpo, Korea in 1956, works for the marginalized in society to promote the dignity of all human beings.

[13]DFL was organized in 1988 in Pennsylvania to foster the sanctity and defense of human life from conception on and DFL is committed to the application of medical and technological skills in support of this principle.

[14]Located in Rome, Italy, DGO's members (including 38 professional staff, 55 residents and fellows and 40 midwives) provide medical assistance, research and training in gynecology and obstetrics and recognize that the life of the human being begins at conception.

FACULTAD DE MEDICINA DE LA UNIVERSIDAD CATOLICA DE CHILE ["FDM"][15]; FAMILY LIFE SOCIETY ["FLS"][16]; FOUNDATION GENESIS ["FG"][17]; GRUPO DE INVESTIGACION EN BIOETICA DE GALICIA ["GIB"][18]; HOPE (TEACHING) HEALTH CLINIC FAMILY LIFE AND NATURAL FAMILY LIFE CENTRE ["HOPE"][19]; INDIAN SOCIETY FOR NATURAL FAMILY PLANNING ["ISNFP"][20]; INSTITUTE OF

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[15]Located in Santiago, Chile, the bio-ethics unit of FDM was formed in 1988 and consists of nine physicians who teach, research and consult in matters of bio-ethics. FDM is dedicated to defend human life from conception until natural death.

[16]Organized in the Republic of Singapore, FLS acts to promote respect for human life at all stages according to the teachings of the Catholic Church. It counsels those in pregnancy crisis.

[17]FG is located in Sydney, Australia and has 1,000 members who disseminate educational and research materials and conduct seminars and lectures on bioethical issues. Its members are mostly medical, legal and clerical professionals.

[18]GIB's membership of 74 academicians, physicians and judges derives from Galicia, Spain. It studies and distributes information especially regarding the respect and dignity of all humans from conception until natural death.

[19]HOPE, which is located in Jamaica, provides educational and emergency medical and dental services to the poor of the Montego Bay area, including pre-natal and post-natal care.

[20]ISNFP was formed in Madras, India, to teach natural family planning and respect for human life. It is non-denominational and services all.

MEDICAL ANTHROPOLOGY & BIOETHICS ["IMAB"][21]; INSTITUTE ON PUBLIC ISSUES RELATING TO HEALTH CARE AND MEDICINE ["IPI"][22]; LIFE ISSUES INSTITUTE, INC. ["LII"][23]; LITHUANIAN ASSOCIATION OF WFDRHL ["LA"][24]; LIVSRETT OG MENNESKEVERD ["LOM"][25]; NATIONAL ASSOCIATION OF OVULATION METHOD INSTRUCTORS ["NAOMI"][26]; NATIONAL ASSOCIATION OF PRO-LIFE NURSES

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[21]IMAB is an international organization of scientists, located in Vienna, Austria, which performs medical and ethics research and publishes books and articles on bioethics issues.

[22]IPI is headquartered in Hirosaki, Japan and has 316 members, including doctors, nurses, ethicists, journalists and lawyers. It conducts interdisciplinary international studies and discussions on health care problems from the viewpoints of sociology, philosophy and ethics.

[23]LII is an educational foundation whose goals include developing a broad-based national effort to stimulate and guide a renewal of pro-life education throughout the U.S. Its seeks to assure equal protection for all human beings from conception until natural death.

[24]Located in Vilnius, Lithuania, LA consists of 207 mostly physicians seeking to achieve legal protection of human life beginning at conception.

[25]Located in Oslo, this 12,500 member organization seeks to change public opinion on abortion. Its efforts, including publishing and lectures are directed toward schools, universities, churches and society in general.

[26]NAOMI is located in London, England. Its 164 instructors in the United Kingdom and Republic of Ireland train instructors in the Billings Ovulation Method. NAOMI is opposed to abortion and abortifacient methods of family planning.

["NAPLN"][27]; NATIONAL COMMISSION ON HUMAN LIFE, REPRODUCTION & RHYTHM ["NCHL"][28]; NATIONAL FEDERATION OF CATHOLIC PHYSICIANS' GUILDS ["NFCPG"][29]; NEDERLANDS ARTSENVERBOND ["NA"][30]; NORSK PRO VITA ["NPV"][31];

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[27]NAPLN was organized in 1973 and has about 1,000 members from across the U.S. It is dedicated to the sanctity of human life from conception until natural death and works to unite nurses who seek to achieve excellence in nurturing and caring for the unborn, newborn, the ill and dying.

[28]NCHL, a group of 120 physicians and educators, headquartered in Oak Park, Florida, publishes the "Child and Family Quarterly" and educates people on values in human and family life and reproduction.

[29]NFCPG is a federation headquartered in Elm Grove, Wisconsin, comprised of Catholic Physicians Guilds from across the U.S., with a membership of about 6,000 physicians. Among NFCPG's purposes is to provide leadership based on its knowledge, skill and experience in medicine. It believes that scientific evidence today clearly supports the view that the life of the individual begins at conception.

[30]Located in Leiden, The Netherlands, NA is an organization of 800 Dutch physicians who work to inform the public, doctors, the media and Parliament of the personhood of the unborn child and the need to uphold the Hippocratic Oath by protecting the unborn and terminally ill.

[31]The oldest pro-life movement in Norway, NPV's 2,500 members work to protect human life from conception until natural death by the disseminating adequate and thorough information.

PHARMACISTS FOR LIFE ["PFL"][32]; PHARMACISTS WHO RESPECT HUMAN LIFE (NSW) AUSTRALIA ["PWRHL"][33]; PHILADELPHIA CATHOLIC PHYSICIANS GUILD ["PCPG"][34]; PHILIPPINE ASSOCIATION OF FAMILY PHYSICIANS IN AMERICA ["PAFPA"][35]; PHYSICIANS FOR LIFE-ALBERTA DIVISION ["PFLA"][36]; PRO LIFE FOUNDATION, HUNGARY

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[32]PFL was incorporated in Ohio in 1984 and has a membership of more than 1,000 pharmacists and scientists from across the United States and from every continent in the world. PFL supports the sanctity and defense of human life from the moment of conception until natural death.

[33]PWRHL, a group of 135 pharmacists from across Australia, believes that all human life is of equal worth, that it is inviolable and that every born and preborn person has a natural right to life.

[34]PCPG was organized more than 20 years ago in Philadelphia and is the largest Catholic physicians group in the country, with hundreds of members from the Delaware Valley area. It informs and assists the Philadelphia Archdiocese and gives aid and assistance to charitable groups and the homeless.

[35]PAFPA was incorporated in Michigan in 1990. It is comprised of 130 family physicians of Philippine descent from across the U.S. PAFPA promotes the practice of medicine by family physicians and is committed to the principle that human life begins at conception.

[36]PFLA, which is headquartered in Edmonton, Alberta, Canada, supports and promotes conferences and meetings intended to educate physicians and the public so as to achieve respect for human life from conception until natural death.

["PLFH"][37]; PRO LIFE VICTORIA INC. ["PLV"][38]; PROFESSOR DOCTOR G. A. LINDEBOOM INSTITUTE CENTRE FOR MEDICAL ETHICS ["PDGAL"][39]; RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA ["RTLTA"][40]; SCIENTISTS FOR LIFE ["SFL"][41];

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[37]PLFH was organized in Budapest in 1991, to spread scientific information about abortion and euthanasia through the media and lectures and courses for high school and college students. Its president is the Archbishop of Hungary.

[38]PLV is an organization of over 1,000 members in Melbourne, Australia, which acts to uphold and promote the intrinsic value of human life and the rights of unborn children from the time of conception. It sponsors a pregnancy support service and is active politically.

[39]PDGAL is a foundation, located in Ede, The Netherlands, and acts to further Christian medical ethics in health care through teaching, research and writing.

[40]Located in Toronto, Ontario, Canada, this group has 20,000 members who believe that the right to life is the basic human right on which all other rights depend; all human beings share this right before and after birth and society has a duty to protect it. RTLTA performs many educational activities and has a research and resource center that provides information on abortion, euthanasia and other life issues. It also provides counseling for pregnant women in distress.

[41]SFL was incorporated in Ohio in 1991, is comprised of persons with professional degrees in the sciences, including medicine and has a national membership of approximately 150. Its main purpose is to educate people and disseminate scientific information about life issues, including abortion.

ST. COLUMBAN'S CLINIC ["SCC"][42]; THE CATHOLIC MEDICAL GUILD OF SINGAPORE ["CMGS"][43]; THE DIETRICH BONHOEFFER INTERNATIONAL INSTITUTE FOR BIOETHICAL STUDIES INC. ["DBI"][44]; THE GUILD OF ST. LUKE, S.S. COSMAS & DAMIAN ["GSL"][45]; THE HUMAN LIFE FOUNDATION ["HLF"][46]; THE INTERNATIONAL SOCIETY OF

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[42]SCC is located in Chun Chon City, Korea and is comprised of 30 medical professionals, social workers, catechist and missionary religious sisters who provide medical, social and educational services to all peoples. SCC believes that each human being is entitled to recognition and protection beginning from conception.

[43]This group of 270 doctors, dentists, dental surgeons and pharmacists located in Singapore organizes medical seminars and spiritual enrichment programs on pro-life and natural family planning matters.

[44]Located in Adelaide, Australia, DBI promotes the study of human life ethics by providing speakers from its membership of over 300. It makes sub-missions to government and has published booklets on bioethical issues.

[45]GSL is a guild of Catholic doctors, organized in Wellington, New Zealand, which seeks to promote the spiritual and intellectual welfare of Catholic Medical Practitioners, study and discuss medical problems, especially those of a moral, ethical, philosophical and spiritual nature and uphold the moral law in the practice of medicine.

[46]Located in New York City, HLF seeks to promote educational and charitable efforts in relation to the unborn's right to life. It publishes Human Life Review and provides assistance to women to have, and not abort, their children. Ten thou-sand contributors support the foundation.

PRENATAL AND PERINATAL PSYCHOLOGY AND MEDICINE ["ISPPPM"][47]; THE MEDICAL EDUCATION TRUST ["MET"][48]; NEW ZEALAND DOCTORS FOR LIFE ["NZDFL"][49]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-AUSTRALIAN BRANCH ["WFDRHLAB"][50]; WORLD FEDERATION OF DOCTORS

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[47]ISPPPM, formed in Vienna in 1971, with its main office in Cracow, Poland, has a worldwide membership comprised of all types of medical specialists and includes educators, anthropologists, ehtnologists, philosophers and social economists. ISPPPM promotes research and education in the field of human development and edits the official journal, The International Journal of Prenatal and Perinatal Psychology and Medicine and organizes a world congress held every three years.

[48]MED is the Liverpool based charity arm of The World Federation of Doctors Who Respect Human Life-British Section (see fn. 53). Its purpose is to identify factors which contribute to the health and well-being of man and to promote research into factors pertaining to the quality of life. Its many publications include those pertaining to the health hazards to the mother of abortion.

[49]NZDFL was organized in 1981 by a group of physicians and aims to: practice and promote ethical medicine as described by the Declaration of Geneva of the World Medical Association 1948; educate the medical profession and society at large regarding professional responsibility towards humanity; further legal protection for all members of the human race, both born and unborn; and promote scientific, social and economic measures to facilitate the practice of ethical medicine.

[50]WFDRHLAB is headquartered in Sydney, Australia and its 500 members, all of whom are medical professionals, conduct seminars, petition legislators and issue press releases about the bio-ethical issues associated with human life as they

WHO RESPECT HUMAN LIFE-BRITISH SECTION ["WFDRHLBS"][51]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE SOUTH AFRICA ["WFDRHLSA"][52]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-UNITED STATES BRANCH ["WFDRHLUS"][53]; WORLD ORGANIZATION OF THE OVULATION METHOD-BILLINGS ["WOOMB"][54].

SUMMARY OF ARGUMENT

A Writ of Certiorari should be granted in this case because the new scientific information obtained in the last ten years leaves no doubt that the unborn child is a

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seek to uphold respect for human life from conception until natural death in terms of the Geneva Declaration of 1947 and the Helsinki Declaration.

[51]Headquartered in Liverpool, WFDRHLBS is a group of 500 physicians from throughout the United Kingdom who witness to the Hippocratic tradition of medicine. It makes submissions to government bodies on ethical issues, including abortion.

[52]WFDRHLSA, which is located in Cape Town, consists of 450 medical professionals who strive to influence and give support to doctors regarding respect for human life at all stages of development until natural death.

[53]Located in Oak Park, Florida, WFDRHLUS works to protect human life from conception until natural death by educational and consultative means. It has a membership of 100 drawn from the entire U.S.

[54]This worldwide organization which was formed in Los Angeles in 1977, has its main office in Kew Vic Australia. WOOMB seeks to strengthen family life and to promote love of the child. In addition to many other activities, WOOMB conducts scientific research into human reproductive technology.

human being from the moment of conception. Scientific technology has revolutionized how mankind obtains knowledge about the unique identity, completeness and development of the child from conception to birth. What science has learned at the molecular level belies many of the assumptions made at the time of *Roe v. Wade*, 410 U.S. 113 (1973): it is now known that children experience pain during surgical abortions as early as eight weeks after conception. Old assumptions about when and how human beings first feel pain no longer apply. New advances require a determination that a child is a human being from conception and that abortion results in the child's painful death.

ARGUMENT

I. THE LIFE OF A CHILD BEGINS AT CONCEPTION. SIGNIFICANT SCIENTIFIC DISCOVERIES SINCE *ROE V. WADE* SUPPORT THIS CONCLUSION. THERE NOW EXISTS A CONSENSUS IN SCIENCE AND MEDICINE ABOUT THE FACTS WHICH FORM THE BASIS FOR THIS CONCLUSION. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHEN LIFE BEGINS AND THE RIGHTS OF THE CHILD.

A. Introduction

Since this Court's decision in *Roe v. Wade*, there has been an explosion in science and technology that has fundamentally altered science's ability to acquire knowledge about human development. Science can now investigate human development at the molecular level using

recombinant DNA technology[55] and monoclonal antibody technology.[56] Today we can learn what is occurring in human development even before we can see specific structures develop.[57] Scientists now look at a human's building blocks, the proteins and instructions that control the proteins, and view what develops, when it develops, at the molecular level. On a macroscopic level, the new technology of ultrasound and its application to the study of the child in utero permits the observation of the child and how he or she reacts to its environment. Advances in

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[55] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[56] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985. See also, Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Application of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at 129.

[57] By contrast, in 1973, most knowledge about human identity and development before birth was based on gross morphological observations, whereby a scientist would observe a physical structure such as the cerebral cortex or dendritic spines, and when the structure was not present, observe the result. Today we can learn what is occurring in human development before we see structures develop.

electroencephalography permit the early detection of brain wave activity in the fetus. The results of these advances underscore the ignorance that existed in 1973 concerning the child. We now know that incorrect assumptions were made about: the child's existence as a unique human being from conception; his or her development from conception to old age; and the child's ability to feel pain before birth.

The origin and extensive use of molecular biological techniques since 1973 have dramatically changed the way in which modern biology is conducted. By using DNA probe technology, combined with the southern hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with polymerase chain reaction (PCR)[58] it is possible to identify the presence of specific genetic code material in a sample as small as

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[58] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

one cell[59]. This technology can now determine genetic uniqueness, genetic diseases and permit the observation of human development at the molecular level. This is done by analyzing human genes.

B. The Life of Each Person Begins at Conception.

The life of a human being begins at conception when the sperm of the father penetrates the mother's ovum at which point all of the genetic material and information needed for the complete development of a human being is present. The information carried by the father encounters in the same recipient cell the information transmitted by the mother so that almost instantaneously a new constitution is spelled out in genetic terms and everything that is needed to be a human being is present immediately after conception.[60] If, however, the genetic

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[59] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

[60] Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-*

Disciplinary Approach to the Psychology of Individual Growth. New York: Macmillan Publishing Co., Inc., 1974. "The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximaely 1/175 of an inch and its weight is about one 20 millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242; Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. "The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52. "Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its own." pp. 52-53. "This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. "Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and

information is insufficient, conception fails and no human being exists.[61] Not only is it

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half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertlization." Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. "The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410. "Genetically the zygote is complete. It represents a new single celled individual." Moore K. *Before We Are Born*, 3rd ed. Philadelphia: WB Saunders Co. 1989. "Human development begins at fertlization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25. The record in this case contains persuasive testimony by Dr. Jerome LeJeune on this and other points. His description of the genetic phenomena is of assistance to the Court in understanding the events and developments on this point (see, LeJeune test., Loce App. at A-115 to A-133; see also, the numerous authorities found following the Loce petition at A-19 to A-30.)

[61] Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584.

possible to identify the first cell following conception as being human, but the individual itself is identifiable.[62] There is no doubt that, immediately after conception, there

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[62] Moore, K. *Before We Are Born*, 3rd ed. Philadelphia W.B. Saunders Company 1989. "Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produce a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26. Turner, J.S.; and Helms, D.B. Lifespan Developmental 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. "Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52 "Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. "You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environment acts to shape the final product from the moment of conception onward."

exists a complete, separate, unique and identifiable human being.[63]

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[63] Moore, *supra*, 26-28; Volpe, *supra*, 18-20. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975. Audesirk, G.; and Audesink, T. *Biology: Life on Earth.* 2nd ed. New York: Macmillian Publishing Company, 1989. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975. Bernstein, R. and Bernstein, S. *Biology: The Study of Life.* New York: Harcourt Brace Jovanovick, Inc., 1982. Bryant, N.J. *Disputed Paternity.* New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body.* Torstar Books, Inc., 1985. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body.* Torstar Books, Inc., 1985. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body.* Torstar Books, Inc., 1985. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child.* Homewood, IL: The Dorsey Press, 1977. Gilbert, S.F. *Development Biology.* Sunderland, MA: Sinauer Associates, Inc., 1985. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975. Goldenring, J.M. *Development of the Fetal Brain.* 307 The New England Journal of Medicine 564(1982). Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978. Jennett, S. *Human Physiology.* New York: Churchill Livingstone, 1989. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life.* St. Louis: The C.V. Mosby Company, 1974. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of*

The genetic information needed to create a human being is created in DNA.[64] Methylation

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Individual Growth. New York: Macmillan Publishing Co., Inc., 1974. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dubuque, Iowa: Wm. C. Brown Company Publishers, 1983.

[64] Petitioners' genetics expert provides a useful description of this information: physically, it is analogous to the ribbon of tape that is used

of cytosine, discovered about five years ago, supports the conclusion that a human being is a complete person at conception. It was discovered that DNA contains basic information, like a program which instructs the specific development of the human being, with the result that some development is programmed to take place immediately and other

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in a tape recorder. Inside the head of a sperm is a long thread one meter or so in length and so tightly coiled in 23 little pieces that its entire volume can be put on the point of a needle. It contains 23 chromosomes; the ovum has the same number. The interaction of the biological components can be analogized to a tape recorder playing music. When a mini cassette, on which the music of an artist is recorded, is played, one experiences the sounds of a symphony. The tape, however, contains no notes or music or musicians. Because of a special code written on the tape, information will be conveyed in such a way that the tape recorder will read it and make air move through a loudspeaker. What is heard by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg, which receives the tape band from the father, and which has its own tape band, there forms a sort of table or law of life. Within the egg there exists a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which in the analogy is the mini cassette of the symphony), but the information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information.See, LeJeune test., Loce App. at A-118-119.

development later. Every single stage of growth, although programmed at conception, manifests itself as the program is read.[65] This is a significant new finding that science never anticipated at the time of *Roe*. It removes doubt about the nature and completeness of the human person at conception.

Other developments in technology have resulted in discoveries supporting the conclusion that a human being is genetically complete at the moment of conception.

In 1986, science discovered and developed a technique which can determine the identity of a human being. The technique, known as genetic fingerprinting, extracts DNA, examines it and records the unique traits of the individual.

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[65] Chaillet, J.R.; Vogt, T.F.; Beier, D.R.; and Leder, P. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H.; Barton, S.C.; and Norris, M.L. "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L.; Stewart, T.A.; and Leder, P. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719. Gilbert, S.F. *Developmental Biology* Sunderland, Mass.: Sinaver Associates Inc., 1985, at p. 61. Petitioner provides a helpful development of methylation. See, Loce pet. at 16 to 19.

Genetic fingerprinting establishes the uniqueness and identity of each person from the earliest stages of life after conception.[66]

The technologies of molecular biology have recently begun to be used to detect fetal abnormalities and to determine the fetus' sex by analyzing a very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood cells of the mother).[67]

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[66] Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991). Jeffreys, A.J.; Brookfield, J.F.Y; and Semeonoff, R. "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819. Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. Kovacs, B.W.; Shahbahrami, B.; Medearis, A.L.; and Comings, D.E. "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475.

[67] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow

Using cell sorting technology (another post-*ROE* development) and DNA probe technology, scientists can now determine, for example, the presence of a growing boy or girl from a sample of four milliliters of the mother's blood.[68] It is a fact of human genetics and heredity that a specific person's cells all contain the same DNA composition (except for sperm and ovum cells)[69] so that *the few fetal cells that have found their way into the mother's bloodstream signify the presence of a unique human being existing separately in the mother's womb.*

The ability to detect genetic disorders before birth has improved dramatically during

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Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[68] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[69] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Okls, S.W. *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51.

the last two decades.[70] The application of DNA techniques to prenatal diagnosis of single gene disorders first occurred in 1976.[71]

Another major advancement has been chorionic villus sampling. It was only in 1982 that its potential for use in determining genetic disorders was realized. Due to the fact that trophoblastic tissue has the same "genetic constitution" as the fetus, a sample from the chorionic villi reflects the chromosomal, biochemical and DNA status of the fetus. Therefore, the production of trophoblastic tissue is controlled by the DNA of the developing child and not by that of the mother. This procedure uses tissue collected in the first trimester of life.[72]

The techniques involved in "in vitro" fertilization demonstrate that the child is a

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[70] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

[71] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

[72] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

unique human being from conception. Before implantation, the new human being is clearly separate from its mother. During the period after fertilization and before implantation, it is possible to determine the sex of the child whose development began apart from both the mother and father.[73] The pre-implantation diagnosis of certain genetic diseases is also considered a feasible medical advance.[74] These procedures support the conclusion that the pre-implanted embryo is a genetically unique and complete human being.

The goals in the study of human embryo viability in synthetic culture medium are improved development and pregnancy success. Recently, an embryo derived platelet activating factor was discovered which, when added to growth media, dramatically increased the developmental potential of the embryo.[75]

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[73] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

[74] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

[75] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation

This chemical, produced by the new human, supports the conclusion that, even before implantation, there exists an independent, unique human being able to produce substances that enhance its own chances for survival.

The "fetus" is not "part of" a woman's body. If it were, the mother's body would control the child's genetic growth and development. Using modern molecular biology technology not available in the 1970's, it has been found that, by the third cell division after fertilization, control of growth and development has been established by the new human being's DNA.[76]

In 1981, the Subcommittee on Separation of Powers of the Judiciary Committee of the U.S. Senate conducted extensive hearings on the question of when life begins and, based on the scientific knowledge at that time, the committee concluded:

> Life of a human being begins at conception ... [T]oday the facts are beyond dispute ... physicians, biologists and other scientists argue that conception marks the beginning of

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Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

[76] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Mammalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

> the life of a human being ... [T]here is overwhelming agreement on this point in countless medical, biological, and scientific writings.[77]

There simply is no credible evidence to refute this conclusion.

II. BASED ON NEW SCIENTIFIC AND MEDICAL INFORMATION IT IS NOW KNOWN THAT A CHILD EXPERIENCES PAIN DURING ABORTION EVEN AS EARLY AS EIGHT WEEKS AFTER CONCEPTION.

Studies conducted using new technology have produced data supporting the conclusion that the unborn child is subjected to great pain during an abortion, and that the child experiences pain as early as eight weeks after conception.

A. The New Technology

Development of techniques of monoclonal antibody production, first described in 1975, using mouse material and then further developed to allow the production of specific human antibodies in the early 1980's[78], has

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[77] Report on Human life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

[78] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62

complemented DNA and RNA studies (which are the subject of molecular biology) by allowing for the specific detection and location of individual proteins or peptides in a human cell sample.

The use of monoclonal antibody technology[79], as well as recent developments in modern protein chemistry and electrophysiology, are being applied to questions relevant to human developmental neurobiology. Initially applied in the mid 1980's, this technique was seen to have the potential to revolutionize the understanding of the human nervous system at its inception. Scientists recognized that with this technology they could investigate nervous system function and development at the molecular or chemical level and were no longer limited to observations of the histological presence of nerves and other gross functionality. From the start, this technological application showed that the classical histo-

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(1984): 109-120, at p. 109.

[79] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

logical and functional criteria for defining (nerve) cell types was oversimplified.[80]

One result was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning of the human nervous system. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since then, similar substances have been found to be present in nerve fibers. This discovery was described in 1985 as revolutionary.[81] The neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two important neuropeptides are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[82] The detection of these two neuropeptides in samples of human tissue has

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[80] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[81] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[82] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

been used to define and locate nervous system development and function in the human being from the time of conception. In 1985, the study of neuropeptides was still in its infancy. Due to the accelerated pace of study, however, it disclosed a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. The discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which techniques were available in the 1970's.

B. Assumptions About Pain.

Since *Roe v. Wade* there have been a number of formerly held assumptions about human neurological development and our ability to feel pain that have since been refuted. The first assumption was that neonates were incapable of feeling pain.[83] The second assumption was that myelinated nerve fibers were necessary for pain perception and that, since they did not form completely until after birth, pain perception was a late developmental event. The third assumption was that pain experience required pain detecting nerves

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[83] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

connected to the thalamus and then to the brain cortex; there was presumed to be a period of cortical maturation necessary before pain could be experienced. All of these assumptions were based on gross histological observations. Those making such assumptions did not know about neuropeptides and they did not have available the modern methodologies and techniques developed in the last decade.

Only recently has it been understood that even neonates feel pain.[84] At the time of *Roe*, it had been assumed by the medical community that a fully developed and mature cortical brain region was necessary for pain perception. This assumption was inconsistent with the observations of those who cared for premature infants,[85] biochemical studies

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[84] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[85] One of whom stated eloquently: "It has generally been assumed that the ability of a child to feel pain increases with age and that neonates may not perceive pain or may perceive it only minimally. Assumed by whom? Certainly not by those of us at the bedside of critically ill infants, who see them flinch from procedures, startle in response to loud noises, and turn from bright lights and various other forms of stimulation. Not by those who have heard infants' anguished cries and seen their vigorous withdrawals from painful stimuli. Not by those who have observed their increased heart and respiratory

supported the observations of care givers concerning pain experiences.

Studies on unborn and premature infants show that pain is experienced much earlier in development than previously thought. Detailed hormonal studies in pre-term neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity, events consistent with stress resulting from pain.[86] It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to the pre-term neonate[87] and to the fetus.[88]

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rates and profuse sweating in response to heel sticks or circumcision. And finally, not by those who have seen babies gasp for every breath as they die from incurable lung disease."
Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347.

[86] Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417.

[87] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431.

C. The Need to Relieve Pain During Fetal Surgery.

Since 1981, the field of fetal surgery has made dramatic advances. It is now common practice during fetal surgery to monitor fetal vital signs and to give the fetus anesthesia.[88] "Although the mother is

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[88] Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176. See Nathanson at 52a.

[89] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

anesthetized for fetal surgery, the fetus becomes the prime target for the anesthesia."[90] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient, requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[91] Studies indicate that performing surgery on unanesthetized fetuses results in automic nervous system stimulation, increased hormonal activity, increased motor activity, and variations in heart rate.[92] Anesthesia is used in fetal surgery on children as young as 18 weeks gestation.[93]

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[90] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

[91] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[92] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[93] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

D. Non-Myelinated Nerve Fibers Transmit Pain.

Until recently, pain perception was presumed to require myelinated[94] nerve fibers[95] which are present only later in development. It has now been shown that this is not necessarily the case.[96] Both myelinated and non-myelinated nerve fibers transmit pain.[97] Most fibers of the nervous system of a newborn infant are not myelinated until two years after birth when the spinal cord, brainstem, and cerebellum are finally myelinated.[98] Myelin is not needed to conduct impulses over the non-myelinated fibers, although non-myelinated fibers conduct slower than mye-

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[94] Myelin is the fatty substance that makes up the sheath around many nerve fibers.

[95] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[96] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[97] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at 1322.

[98] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

linated ones.[99] "Even when mature, most peripheral pain fibers are unmyelinated or, at best, thinly myelinated, lack of myelination therefore cannot be used as a valid argument to deny pain appreciation in the newborn."[100]

E. It is Now Known that Full Cortical Development Is Not Needed for a Child to Experience and Respond to Pain Prior to Birth.

Science no longer accepts that cortical involvement is necessary for pain detection.[101] Evidence to support the premise that pain can be experienced by children before 23 weeks gestation comes from the early detection of pain-associated chemicals; the timing of nerve development; the observation of fetal behavior and the study of full-term infants with anencephaly.

The discovery of neuropeptides and their function as nerve impulse transmitters and

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[99] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, p. 109,

[100] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320.

[101] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects." Dev. Pharmacol Ther 15(1990): 142-148, at p. 144. See also discussion at p. 71-73.

modulators was totally unknown at the time of *Roe* and is recognized as revolutionary.[102]

In order to experience pain, there must be an event and the detection of the event outside the brain region. It is a very important recent observation that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at 11 weeks post-fertilization, and enkephalin positive neurons and nerve fibers were detected at 13 weeks post-fertilization. Levels of substance "P" and enkephalin at 12 to 14 weeks were comparable to levels found in the full-term baby. In 1990, as a result of this revelation, researchers have stated that:

> [T]he importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardio-vascular, gastrointestinal and respiratory functions in the human has to be stressed.[103]

None of the significant techniques used in the cited study were available in 1973. Others

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[102] See the discussion of the role of neuropeptides in pain transmission found in the Loce pet. at 21 to 24.

[103] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

have found substance "P" present at five weeks gestation and it has been detected at all stages of development from that point on.[104]

In the last seven years, science has examined the relationship between substance P and pain.[105] It has found that substance "P" (a neuropeptide), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization.[106] Nervous system development and function occur well before 28 weeks gestation.

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[104] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S.; Rizvi, T.A.; and Bijiani, V. "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C.; Charnay, Y.; Chayvialle, J.A.; Daniere, S.; and Dubois, P.M. "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.

[105] Uddman, R.; Edvinsson, L.; Jansen, I.; Stiernholm, P.; Jensen, K.; Olesen, J.; and Sunder, F. "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399.

[106] Luo, C.B.; Zheng, D.R.; Guan, Y.L.; and Yew, D.T. "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

If a neocortex is needed for pain detection, then the fact that neocortex development begins at eight weeks gestation and the fetus has all its neurons by 20 weeks is pertinent.[107] Some may assume that a degree of cortical maturity is necessary for pain perception. That assumption led physicians to assume, at the time *Roe* was decided, that newborns did not feel pain. Clearly, that assumption was wrong.

Until recently, science was incapable of answering questions about the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of the key chemicals at the time *Roe* was decided. Absent knowledge about pain transmitting chemicals, it was thought that a physical structure such as dendritic spines was necessary to "determine" when pain transmission was possible. The presence of pain transmitting chemicals before the presence of such physical structures makes pain transmission possible at an earlier gestational time. A recent review summarized the current state of understanding of the

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[107] Marin-Padilla, M. "Structural Organization of the Human Cerebral Cortex Prior to the Appearance of the Cortical Plate." *Anat Embryol* 166(1983): 21-40, at p. 21.

function and development of the brain in the developing human.[108]

Using modern techniques to identify different types of nerve synapses as well as different types of neurotransmitters in samples taken from 8 to 37 week old fetuses,[109] it was concluded that the morphological substrate for nociception (pain detection) in the spinal cord exists at very early stages of development. As early as the end of the first trimester, the thalamus, third ventricle, midbrain, brain stem and cerebellar hemispheres are developed and their appearances, besides physical size, go unchanged throughout the rest of fetal

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[108] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen*(1991): "Neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood ...Somatosensory functions are developed at an early stage. The pain threshhold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks." *Id.* at 1880-5.

[109] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

development.[110] Nature in its wisdom prepares the nervous system first so that all other systems can develop and function as they should.[111] This is logical since pain detection and response to pain are important to the human's ability to survive.

It was also recently discovered that many behaviors characteristic of newborns are also

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[110] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison et al., 92-130, Philadelphia: W.B. Saunders Co., 1991, at p. 122. Others have also observed many of the important parts of the puzzle early in development. At seven weeks gestation, cutaneous sensory receptors appear in the fetus. This is preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord. Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. A basic sensory response loop is present very early in human development. It is noteworthy that, with ultrasound, we can observe movement by the fetus away from outside stimulation by the eighth week. Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351. Brain activity, as detected by electroencephalography, is also present at 8 weeks gestation. Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[111] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life*. St. Louis: The C.V. Mosby Company, 1974, at p. 35.

found in anencephalic children[112] (children born without a developed cortex[113]). Such behaviors were formerly erroneously ascribed to cerebral hemispheric activity.[117]

During their brief post-birth lives[118] these children breath spontaneously and have a grasp response.[119] They respond to noxious stimuli known to cause pain by avoidance, withdrawal and by crying.[120] They breath,

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[112]The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[113]Shewmon, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[117] *Id.*

[118] Anencephalic children have a post-birth life expectancy of a few hours to a few months.

[119] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[120] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and

cough, hiccup, smile, grimace, yawn and suck.

In a recent study of twelve anencephalic infants, all responded to pain, all had an exaggerated sustained response to touch, all evinced spontaneous movement, and all breathed spontaneously.[121] Additionally, seven of the twelve responded toward stimulation at their mouths (rooting response) and seven had a sucking response.[122] Spontaneous movement in the fetus begins between 6 and 7 1/2 weeks gestation.[123] Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking is present at 11 weeks gestation.[124] Based on this study, one can conclude that the

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Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[121] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[122] *Id.*

[123] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[124] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

fetus at 6 to 11 weeks gestation is neurologically developed to a point at least equivalent to the twelve anencephalic children described above; in other words, they are all capable of experiencing pain.

The recent biochemical evidence unavailable in 1973, supports the finding that, at very early stages of fetal development, the fetus experiences pain. This evidence is consistent with observed fetal behavior (using real time ultrasound) which shows the fetus moving away from painful stimuli at 8 weeks gestation, the same behavior observed in full-term anencephalic infants. Modern instruments pick up brain wave activity, also at 8 weeks gestation. Together, these observations point to an active sensory system present and functioning in the fetus at 8 weeks gestation, which allows the unborn child to feel pain.

CONCLUSION

There is a scientific consensus, based on recent scientific advances, that a unique human life begins at conception, that pain is experienced as early as eight weeks gestation and that abortion results in the painful death of a unique and irreplaceable human being.

GIL D. MESSINA

Supreme Court, U.S.
FILED
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No. 93-1148
No. 93-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

TINA KRAIL, ET ALS.,

Petitioners,

- against -

THE STATE OF NEW JERSEY,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI TO SUPREME COURT OF NEW JERSEY BY AMERICAN CENTER FOR LAW AND JUSTICE, ET ALS.

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AMICI CURIAE.

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I. THE CENTRAL QUESTION PRESENTED HAS NEVER BEEN RESOLVED BY THIS COURT, AND IS THEREFORE BEFORE THIS COURT AS AN "ORIGINAL MATTER." THE REQUIREMENTS OF STARE DECISIS FOR OVERRULING ROE V. WADE ARE COMPLETELY SATISFIED BY THE FACTS OF THIS CASE. THE COURT SHOULD GRANT THE WRIT TO DECIDE THE CHILD'S RIGHTS. 28

A. THE QUESTION OF WHEN THE LIFE OF A CHILD BEGINS WAS NOT DECIDED BY *ROE* AND IT IS THEREFORE THE DUTY OF THIS COURT TO RESOLVE THE QUESTION. IT WAS THE PROMISE OF *ROE* THAT A SUBSEQUENT COURT WOULD DECIDE THIS ISSUE WHEN "MAN'S KNOWLEDGE" WAS SUFFICIENT TO PERMIT. 30

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INTERESTS OF AMICI

Each amicus curiae hereinafter named in support of the Petitions for Certiorari has an interest in this case because each is an organization which exists and acts for the purpose of achieving the legal recognition and protection of all human beings, whether born or unborn, and by actively seeking to end legalized abortion and the so-called "right to abortion". These amici represent literally millions of people from around the world. Their experiences with the tragic effects of abortion on, not only the immediate victims -- the children -- but upon women, fathers, siblings, the family and society generally, lend a most valuable perspective to the arguments to be presented that might otherwise be lost.

The amici curiae who appear in support of the Petitions for Certiorari are: ABORTION'S AFTERMATH ["AA"][1]; ACCION FAMILIAR ["AF"][2]; ADEVIDA[3]; ALLIANCE FOR LIFE

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[1]AA was founded in 1989 to provide networking support for post-abortion women in New Jersey. This Edison-based organization has ties with over 50 post-abortion support organizations in New Jersey, which in turn have contact with about 5,000 women per year.

[2]AF is an unincorporated association that was formed in 1979 in Spain in order to help the family with all aspects of problems facing the family today, including, in areas related to legal and moral issues. Its main office is located in Madrid. AF believes that the family is the root of all health and sickness in

["AFL"][4]; AMERICAN CENTER FOR LAW AND JUSTICE ["ACLJ"][5]; AMERICAN FAMILY ASSOCIATION,

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society. AF promotes family values and supports the position that life cannot be taken by anyone from the moment of conception until natural death.

[3]Organized in Madrid, Spain in 1979, Adevida provides financial, medical and human support to pregnant women in difficulties. It publishes a pro-life statement daily in the Spanish press which is signed by approximately 1,350 university professors and teachers. Its members participate annually in the March for Life.

[4]AFL was formed in Canada in 1972 and its main office is located in Winnipeg, Manitoba. Its purposes include educating Canadians on matters of human development, human experimentation, reproductive technologies, adoption, abortion, chastity, euthanasia and similar issues. AFL provides educational services and materials for its member groups to educate Canadians and provides counseling and referral services to the public with respect to unforeseen pregnancies and post-abortion trauma. AFL coordinates 250 educational pro-life groups throughout Canada.

[5]ACLJ is a national public interest law firm, chartered to enter the legal arena on issues of broad public interest. ACLJ has members in all fifty states. Attorneys from every state of the Union have affiliated with ACLJ to assist in the restoration of pro-liberty, pro-life and pro-family values.

INC. ["AFA"][6]; AMERICAN RIGHTS COALITION, INC. ["ARC"][7]; A.O.C.P.A.[8]; APOSTOLATUS UNITE ["AU"][9];

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[6]AFA is a corporation organized in 1977 with offices in Tupelo, Mississippi. AFA's local chapters are active in seeking to preserve the lives of unborn children and the physical and emotional health of their mothers. AFA has approximately 600 local citizen chapters throughout the U.S. which are active in seeking to preserve community integrity through the implementation of public decency laws. It has a subscribers list of more than 885,000 individuals and churches for its monthly newsletter, AFA Journal.

[7]ARC was incorporated in Tennessee in 1987. ARC assists women with the physical and emotional problems resulting from abortion by referring women to medical, emotional and legal providers for assistance, including bringing malpractice claims against those who injure them through abortions.

[8]Organized in 1982 in Paris, France and 13,000 members strong, A.O.C.P.A. is a pro-life organization engaged in judicial and financial actions against abortion. Its purpose is to mobilize the public to oppose abortion by taking legal action, demonstrating and lobbying members of Parliament.

[9]AU was organized in 1986 and incorporated in Maryland in 1988. It has its offices in Woodstock, Virginia. AU is a Catholic lay organization which has as its purpose to bring people to Jesus Christ to experience the Holy Eucharist through the Holy Mother of the Church, in

AUSTRALIAN FEDERATION OF RIGHT TO LIFE ASSOCIATIONS ["ARTL"][10]; BESWICK FAMILY FUND ["BFF"][11]; CAMPAIGN LIFE COALITION ["CLC"][12]; CATHOLIC WOMEN'S LEAGUE OF NEW ZEALAND

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union with the Holy Father. AU organizes Rosary Congresses which consist of one to seven day prayer gatherings featuring Eucharistic adoration, Marian devotion and sound church teaching. A Global Week of Prayer is conducted annually in 88 countries, with over 11 million participants, during which participants pray and fast to end abortion.

[10]ARTL was formed in Sydney in 1980 and has 30,000 members today. Its objects are to foster cooperation between member associations and to act as a national voice on all national matters regarding the protection and enjoyment of human beings of their right to life.

[11]BFF was formed in Sydney, Australia in 1967. It has 18 members, all of whom are members of the Beswick Family. BFF operates to support public charitable purposes and good works by personal and financial effort, including the protection of unborn human life.

[12]CLC is the pro-life national political organization in Canada. CLC engages in lobbying, counselling of pregnant women in distress and seeks to achieve the enactment of laws which will protect all human beings from the moment of conception until natural death.

INCORPORATED ["CWLNZ"][13]; CATHOLICS UNITED FOR THE FAITH, INC. ["CUFF"][14]; CENTRO DE INVESTIGACION Y DOCENCIA ["CDIYD"][15]; CHRISTIAN ACTION RESEARCH & EDUCATION ["CARE"][16]; CHRISTIAN ADVOCATES SERVING EVANGELISM ["CASE"][17]; COALITIONS FOR

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[13]CWLNZ was established in 1931 in New Zealand and has about 5,000 members. CWLNZ is based in each of the six dioceses of New Zealand. CWLNZ's objects are to unite Catholic women in New Zealand in Christian fellowship in order to enhance the growth of their spiritual, intellectual, family and social life, and to foster mission and charitable works and social action. It is actively opposed to abortion and supports the protection and sanctity of human life from conception until natural death.

[14]Organized in New Rochelle, New York in 1968, CUFF strives to advance and defend the teachings of the Catholic Church, including as to the sanctity of all human life. Its membership of 16,000 derives from throughout the world.

[15]CDIYD is dedicated to the promotion of natural family planning and defense of human life.

[16]CARE is headquartered in London, England and seeks through its 100,000 members to promote Biblical and Christian action so as to support the integrity of the family, centrality of marriage and the sanctity of human life from conception.

[17]CASE is a legal defense organization dedicated to protecting, preserving and defending the right to proclaim the Gospel

AMERICA ["CFA"][18]; DELAWARE LAWYERS FOR LIFE ["DLL"][19]; DELAWARE RIGHT TO LIFE ["DRL"][20];

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of Jesus Christ in public places. CASE is particularly concerned by a disturbing tendency to undermine both cherished First Amendment freedoms and the fundamental right to life in the name of a judge-created "right" to abortion.

[18]CFA was incorporated in 1977 and is headquarted in Washington, D.C. CFA is a grass-roots organizing and lobbying organization that coordinates activities amongst about 100 organizations nationwide in areas related to social issues, defense and foreign policy, legal and judicial matters, political reform and economic issues. CFA takes a pro-life position on the abortion issue.

[19]DLL is an unincorporated, non-denominational association of Delaware lawyers which was formed approximately two years ago. DLL has a membership of more than 30 Delaware lawyers. The organization is involved in the representation and counseling of primarily single women who are clients of Birthright crisis pregnancy centers. DLL's members respect and defend the sanctity of human life from the moment of conception.

[20]DRL is a Delaware corporation with headquarters in Newark, Delaware. The corporation was formed in 1973 in order to educate people regarding issues of life, abortion and euthanasia. DRL supports respect for human life from fertilization until natural death. DRL has approximately 1,250 dues paying members, with about twice that number on its

EUROVITA[21]; FAMILLES-UNIES ["FU"][22]; FAMILY AND YOUTH CONCERN ["FYC"][23]; FAMILY LIFE ASSOCIATION OF CAMEROON ["FLAC"][24]FAMILY LIFE COUNSELLING

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newsletter mailing list.

[21]Located in Paris, France, Eurovita provides a platform for pan-European pro-life groups in which information and resources are shared to defend the unborn child.

[22]Headquartered in Brussels, Belgium, FU publishes a periodical, runs a library and conducts meetings and youth camps, all with the purpose of promoting the family and human life. Its 1,200 members come from Belgium, France, Germany, Denmark and Switzerland.

[23]FYC was established in 1971 in the United Kingdom and currently has a membership of approximately 25,000 people. FYC, headquartered in Milton Keynes, England and having three branches in the United Kingdom, is concerned with, and has acted as a focus for, the welfare of the family and the issue of abortion which is necessarily an important part of the overall concern for the family.

[24]FLAC was organized in the Kumbo Diocese of Cameroon in 1982. Its membership of more than 500 couples, parents and youth are active in pro-life activities, including, teaching natural fertility regulation, anti-abortion activities, chastity education and other pro-family activities.

ASSOCIATION OF KENYA ["FLC"][25]; FAMILY OF THE AMERICAS ["FOA"][26]; FAMILY PROTECTION LOBBY ["FPL"][27]; FEMINISTS FOR LIFE OF AMERICA ["FFLA"][28];

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[25]FLC is headquartered in Nairobi, Kenya and has a membership of 440. FLC is active in opposition to abortion and provides education on natural family planning, the care and protection of human life from conception and prevention of HIV infection.

[26]FOA was incorporated in 1977 in Missouri. This organization, whose office is in Dunkirk, Maryland, provides educational services to women and families on matters of natural family planning and teaches parents to enable them to remain the primary educators of their children regarding human sexuality. FOA's educational materials have been translated into more than 22 languages and those who work in its programs are drawn from throughout the world.

[27]FPL is an unincorporated association which was formed in Maryland in 1980. The purpose of FPL is to lobby the state legislature on behalf of evangelical churches in Maryland and to represent its membership on Judaeo-Christian issues, including in support of the position that human life begins at conception. FPL has 3,000 active members.

[28]FFLA is a Wisconsin corporation which was formed in 1973 and which actively seeks to continue to promote and expand over a century of effort by feminists toward achieving the goal of a society in which women are empowered to

FORTRESS INTERNATIONAL ["FI"][29]; FIDELITY MAGAZINE ["FM"][30]; FREE SPEECH ADVOCATES ["FSA"][31]; GALWAY FOR LIFE ["GFL"][32]; GROUPEMENT D'ELECTEURS

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make life-affirming decisions for themselves and their children. Headquartered in Kansas City, Missouri, FFLA has a total membership of approximately 5,000 nationwide with 47 affiliated chapters throughout the continental United States. FFLA actively opposes societal pressures, direct and indirect, which compel, coerce or create pressure on a woman to abort her child.

[29]FI is an Illinois corporation formed in 1989 and consisting of 500 members. FI assists women who become pregnant as a result of rape or incest as well as assisting the children conceived as a result of such acts.

[30]FM, located Indiana, explicates family, moral and sexual issues from a Catholic perspective. It takes the pro-life position regarding human life.

[31]FSA is a legal defense project that exists to secure the First Amendment rights to engage in religious witness, peaceful sidewalk counseling, and protest of, or conscientious objection, to the destruction of unborn human life. FSA endeavors to assure a proper and competent defense, due process, and all constitutional rights to those who take a stand against abortion.

[32]Located in Galway, Ireland, GFL distributes information and letters to politicians, newspapers, radio and

CHRETIENS ["GDC"][33]; GUILD OF CATHOLIC LAWYERS OF NEW YORK, INC. ["GCLNY"][34]; HANDICAP DIVISION OF THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN ["HDSPUC"][35]; HAPPY FAMILY MOVEMENT OF KOREA ["HFM"][36]; HERMANDAD SAN BENITO POR UNA

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television demanding a referendum in support of the rights of the unborn. It has 120 members drawn from Galway County.

[33]Comprised of Belgians who study politics and disseminate information, GDC assists voters in their choice of political representatives who will respect the moral principles of Christian civilization, including principles relating to the rights of the unborn.

[34]GCLNY, consisting of 300 lawyers from the Archdiocese of New York, provides spiritual and ethical guidance to its members and believes that the lives of all persons, beginning at conception, are entitled to legal protections.

[35]All of the 650 members of HDSPUC are either disabled, or they are the parents of, or care-givers to, disabled persons. Their purpose is to campaign to secure the right to life of all disabled persons from the moment of conception until natural death. HDSPUC is headquartered in London.

[36]HFM runs 80 "old folks homes," 5 homes for unwed mothers and has provided guidance in natural family planning to more than 500,000 couples throughout the Republic of Korea. Its members number 2,000 and they endeavor to protect the family and all human life beginning from

EUROPA CHRISTIANA ["HSB"][37]; HOLT CHILDREN'S SERVICES ["HCS"][38]; HUMAN LIFE FOUNDATION OF NEW ZEALAND ["HLF"][39]; HOSPITAL CHRISTIAN FELLOWSHIP, INC. ["HCF"][40]; HUMAN LIFE INTERNATIONAL SOUTH

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conception.

[37]HSB, which is located in Madrid, Spain, has a membership of 260 and strives to insure that the emerging unity of Europe consists of mores and institutions consistent with the doctrine of the Catholic Church, including that relating to the protection of human life.

[38]Incorporated in Korea in 1977, HCI is a Christian, non-profit organization which strives to help every homeless child to have a family. HCI reunites children with birth families or with adoptive families and provides for the welfare of handicapped children and unwed mothers.

[39]HLF was formed in Auckland, New Zealand in 1984 and incorporated in 1985 under the Charitable Trusts Act of 1957. HLF's objects are to promote the saving and protection of human life throughout its whole course from the moment of conception until natural death, with a view to the moral, ethical and mental advancement of the public in order to educate the public as to the need for respecting human life at every stage of its development.

[40]HCF is headquartered in California and has 5,000 members from throughout the United States HCF conducts conferences, seminars, etc., to, among other things,

AFRICA ["HLSA"][41]; INSTITUTE FOR PREGNANCY LOSS ["IFPL"][42]; INSTITUTO DE CIENCIAS FAMILIARES ["ICF"][43]; JAPAN PRO-LIFE MOVEMENT ["JPM"][44]; JEUNES POUR LA

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educate health professionals on ethical issues.

[41]HLSA is located in Cape Town and strives to uphold the sanctity of human life beginning from conception and to strengthen and preserve Christian family values. Its membership is comprised of Christian professional persons.

[42]IFPL was founded in 1990 as an independent non-profit corporation. It is an education, research and treatment center dedicated to the study of the impact of human pregnancy loss, including induced abortion. IFPL is particularly interested in the examination and remediation of traumatic abortion and adoption experiences, both of which are volitional in nature.

[43]ICF was organized in 1952 Uruguay. ICF's primary purpose is to foster natural family planning. In fulfilling its purpose, it operates doctors' consulting rooms and trains instructors and conducts courses in sexual education and family counseling. It publishes the Family Digest and gives talks on television and radio and conducts a four year university course in the education of Family Social Workers. The organization, operates in Uruguay, Argentina, Paraguay and Brazil.

[44]Located in Kochi City, Japan, JPM educates society, through its newsletter, videos and literature, that life begins at

VIE/JUNGEREN VOOR HET LEVEN ["JPVL"][45]; JURISTEN-VEREINIGUNG LEBENSRECHT e.V. ["JVL"][46]; JURISTENVERENIGING PRO VITA ["JPV"][47]; JOVENES POR EL DERECHO A LA VIDA-ECUADOR ["JPD"][48]; KNIGHTS OF

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conception and man does not have the right to destroy it. Its general membership of over 50,000 comes from throughout Japan.

[45]JPVL, is located in Brussels, Belgium and has a membership of 7,368 drawn from Belgium and France. It seeks, by publishing, conducting meetings and supporting women in distress, to further esteem for human life and the person at each stage of growth, beginning with conception and ending with natural death.

[46]This group of 900 German and other European lawyers conducts an annual congress, lobbies and supports scientific and legal research especially as regards the rights of the unborn.

[47]Located in the Hague, JPV publishes a quarterly, "Pro Vita Etc.", engages in letter writing to newspapers and members of Parliament and brings lawsuits to prevent state subsidization of abortion, all for the purpose of protecting human life from conception. JPV is comprised of about 400 barristers, professors, judges, mayors and members of Parliament.

[48]JPD, organized in Quito, Ecuador, is an organization that educates youth to respect life by conducting lectures, conferences and movies at schools, universities and public offices.

THE SOUTHERN CROSS ["KOSC"][49]; LA TREVE DE DIEU ["LTD"][50]; LEGAL ACTION FOR WOMEN ["LAW"][51]; LIFE[52];

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[49]KOSC is an unincorporated association formed in 1923 in Auckland, New Zealand and now headquartered in Wellington. It is an association of Catholic laymen active in the lay apostolate and having over 500 members in 16 branches throughout New Zealand. KOSC is currently engaged in pro-life issues, speaking out against the increasing number of abortions in New Zealand and opposing the pro-euthanasia lobby. Membership in KOSC is broadly based and includes lawyers, doctors and other professionals.

[50]Located in Puteaux, France and having about 5,000 members, LTD strives to protect the helpless, including pre-borns, handicapped, the infirmed and opposes eugenics, racism and the death penalty. It supports "workers of peace" (rescuers, conscientious objectors to abortion) and denounces abortion as a crime against humanity. It actively opposes the abortion pill, RU-486.

[51]LAW was incorporated in Florida in 1988 to assist women who have been physically injured by abortion by making medical malpractice claims against clinics and doctors because of such injuries. LAW refers women for legal assistance and assembles a data base of the country's most notorious abortionists. LAW operates in all 50 states.

[52]A national registered charity in Warwickshire, England, LIFE has a membership of 32,000 from all of the U.K., Ireland, Gibraltor and elsewhere. By its

LIFE AFTER ASSAULT LEAGUE ["LAAL"][53]; NATIONAL COUNCIL OF CATHOLIC WOMEN ["NCCW"][54]; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES

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activities which include counseling, care and housing for homeless and unsupported mothers before and after birth, LIFE seeks to uphold the utmost respect for human life from fertilization and to protect the mother and child from abortion.

[53]LAAL is a pro-life organization located in Appleton, Wisconsin with a membership of over 8,000. It offers prayer and encouragement to sexually abused adults and children and victim to victim counseling.

[54]NCCW was established in 1920 and is headquartered in Washington, D.C. It federates 8,000 Catholic women's organizations in the U.S., which include national organizations such as Catholic Daughters of the Americas (150,000 members), Daughters of Isabella (100,000 members) and Ladies of Charity (35,000 members). There are 123 diocesan councils which are members of NCCW as well as 6,690 parish organizations. In total, NCCW represents between 800,000 and 1,000,000 women nationwide. NCCW addresses issues of concern in areas related to church, family, community and legislation, including questions surrounding abortion and the taking of the life of a child without justification.

["NIFLA"][55]; NATIONAL ORGANIZATION OF EPISCOPALIANS FOR LIFE ["NOEL"][56]; NATIVITAS A.S.B.L.[57]; NEW JERSEY RIGHT TO LIFE COMMITTEE, INC.

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[55]NIFLA was incorporated in April 1993. It is headquartered in Manassas, Virginia and advises, counsels and gives legal assistance in matters of public interest law, particularly to pro-life crisis pregnancy centers throughout the United States, of which there are approximately 3,000. NIFLA trains and provides legal assistance to crisis pregnancy centers to enable them to support women in crisis so that they might carry their babies to term.

[56]NOEL, which was organized in 1966 and has offices in Fairfax, Virginia, has a national membership of 20,000 in 189 chapters in all 50 states. NOEL promotes the biblical view of the sanctity of human life at every stage of development and attempts, through education, publications and assisting pregnant women, children and the terminally ill, to influence the Church and culture to embrace this view.

[57]This unique group of 1,500 friends in Brussels, Belgium seeks to instill the joy of Christmas through the year. Its activities include providing help to religious artists, helping those who are poorly educated to enjoy art, helping generally the poor of Brussels and providing special help, before and after birth, to pregnant women to avoid abortion. The groups consists of all religions, the only requirement being that a member have spirit of charity.

["NJRTL"][58]; NEW ZEALAND SOCIETY FOR THE PROTECTION OF THE UNBORN CHILD INCORPORATED ["NZS"][59]; O.U. STUDENTS FOR LIFE ["OU"][60]; OPEN ARMS

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[58]NJRTL is headquartered in Cranford, New Jersey. Comprised of 70,000 families as members, it is the largest pro-life organization in New Jersey. NJRTL is dedicated to protecting human life from the moment of conception until natural death. It engages in educational, legislative and grass-roots efforts and assists women in crisis pregnancies.

[59]Incorporated in New Zealand in 1970, NZS has its national office in Wellington. NZS has more than 28,000 active supporters from throughout the country and is divided into 70 branches. The objects of NZS are to uphold and promote the intrinsic value of human life and to uphold and protect the rights of unborn children from the time of conception. NZS cooperates with government departments, other groups and persons engaged in fostering respect for human life, and in promoting social conditions which will provide the best opportunities for mothers and children. Members come from all walks of life and ages from throughout New Zealand.

[60]OU is a group of 100 peaceful, positive, hard-working students from Oklahoma University endeavor to educate the university community about all stages of fetal development, the effects of abortion and alternatives to abortion.

["OA"][61]; POLISH UNION OF PEOPLE WHO RESPECT HUMAN LIFE ["PUP"][62]; PREGNANCY COUNSELLING SERVICES INCORPORATED ["PCSI"][63]; PRO-LIFE ACTION

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[61]OA is an international Christian ministry that was incorporated in the Washington State in 1986. Located in Columbia, Missouri, OA has chapters throughout the United States and in other countries. OA is dedicated to bringing hope and healing to anyone suffering from abortion's aftermath. OA is made up primarily of people who have personally experienced the tragedy of abortion and its devastating after-effects.

[62]Organized in Warsaw in 1991, PUP engages in activities throughout Poland in an effort to restore legal protections for all human life, beginning at conception and to promote the dignity of all human life and and the human family.

[63]PCSI is a charitable trust incorporated under the laws of New Zealand. Its principal office is located in Auckland, New Zealand and it has 24 branches throughout that country. PCSI is involved in counseling women distressed by pregnancy and those suffering from post-abortion stress. Post-abortion stress stems from the guilt and grief associated with the knowledge that the woman has killed her child. PCSI counsels some 5,000 women annually.

LEAGUE ["PLAL"][64]; PROFESSIONAL WOMEN'S NETWORK ["PWN"][65]; PRO-LIFE PHILIPPINES ["PLP"][66]; PRO-LIFE SOUTH AFRICA ["PLSA"][67]; PRO-VITA-GEZIM EM LEVEM

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[64]PLAL was formed in Illinois in 1980, where it continues to have its main office. PLAL is a pioneer in pro-life activism. It uses every media opportunity to get the pro-life message out and to bring the focus of public attention back to the unborn child. Although PLAL has no actual membership, it has newsletter subscribers and supporters numbering between 8 and 10,000. PLAL's supporters are drawn from throughout the U.S., Canada, Australia, Ireland and Africa.

[65]PWN represents women from a variety of professional and business fields who recognize the sanctity of all human life. PWN members are lawyers, accountants, consultants, teachers, realtors, professors and systems analysts. It has a membership of between 4,000 and 4,500 which is active in pro-life activities. PWN is considered to be the voice of pro-life professional women.

[66]Incorporated in Manila, PLP is a national educational body coordinating pro-life groups and providing instruction concerning life issues. Its 1,200 members and 10,000 cooperating associates are comprised of Catholics, Protestants and Muslims from all walks of life.

[67]PLSA was organized in Cape Town in 1977 to protect human life from conception to natural death by lobbying legislators, demonstrating, publishing newsletters and audio-visual presentations. This group

["PVG"][68]; PRO-VITA SIBIU ASSOCIATION ["PVS"][69]; RIGHT TO LIFE ASSOCIATION (NEW SOUTH WALES) INC. ["RTLA"][70]; RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA ["RTLLSC"][71]; ROCKLAND COUNTY

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consists of 43,600 members drawn from all religions, races, ages and walks of life.

[68]Located in Mechelem, Belgium, PVG provides help to pregnant mothers in distress and conducts information campaigns in an effort to promote the protection of human life from the moment of conception.

[69]The purpose of PVS is to make Romanian society aware of the full humanity of the unborn child from the moment of conception, to promote the rights of the unborn in accordance with Christian ethics and human rights, and to fight against abortion and abortion laws. The office for this 150 member organization is in Sibiu, Romania.

[70]Headquartered in Sydney, Australia, RTLA has a membership of about 8,000 drawn from the State of New South Wales. RTLA engages in political lobbying, legal actions and educational and counseling activities intended to promote concern for the human rights of the unborn, newborn handicapped and the aged and infirm.

[71]RTLLSC is a California corporation, with offices in Pasadena, California. Its purposes are twofold: to provide education and service. RTLLSC's education department handles several hundred speaking requests per year and the league

CATHOLIC COALITION ["RCC"][72]; SCOTTISH ASSOCIATION FOR NATURAL FAMLY PLANNING ["SANFP"][73]; SERVICE AND RESEARCH FOUNDATION OF ASIA ON FAMILY AND

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holds an annual educational conference with nearly 500 attendees. Its Collegians for Life has clubs on 30 campuses throughout California. In addition, RTLLSC operates 13 Pregnancy Counseling Centers, three medical clinics and four education chapters. RTLLSC has a membership of about 50,000 families drawn mainly from Southern California. In 1992 alone, RTLLSC counseled more than 20,000 women facing unplanned pregnancies.

[72]This unincorporated association was organized in Rockland County, New York in 1990. RCC is a grass-roots organization seeking to educate, inform and speak out on issues supporting Catholic teachings. RCC has approximately 750 members and a mailing list of 4,000. RCC members meet with representatives of school boards and publicizes its positions by communicating with the media and provides a speaking panel to various organizations. RCC takes a position in support of the belief that human life begins at conception and human life is entitled to protection and respect from that point in time until natural death.

[73]Organized in Glasgow, Scotland 1979, SANFP is dedicated to teaching fertility awareness in schools, colleges and to groups of teachers, nurses, doctors, and seminarians to enable couples to responsibly plan their families.

CULTURE ["SARFA"][74]; SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN ["SPUC"][75]; SOCIETY OF ST. VINCENT DE PAUL IN NEW ZEALAND ["SSV"][76]; SOUTHERN

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[74]SARFA is an organization dedicated to going beyond welfare measures for the well-being of women by promoting natural family planning.

[75]SPUC, an unincorporated English association established in 1966, SPUC has 50,000 paying members and 300 local groups throughout the United Kingdom. In addition to its headquarters in London, SPUC has full-time offices in Glasgow, Belfast, Cardiff, Preston, Stockton, Barrow and South London. SPUC was formed to fight the passage of the bill to legalize abortion which was introduced in Parliament. Since its inception, its role has been two-fold: educational and political. As its name implies, its prime concern is to win legal protection for the unborn child from the moment of conception until birth and so most of its work is concerned with spreading and extending knowledge of the humanity of the human person before birth and demonstrating that abortion represents the most fundamental abuse of human rights. SPUC is regarded both inside and outside Parliament as the foremost political body fighting against abortion and euthanasia.

[76]Originally formed in France in 1833, SSV was incorporated in New Zealand in 1883. SSV is an international charitable organization whose members practice Christianity by helping those in need on a person-to-person basis. Although Catholic in origin and character, SSV is open to

DOMINICAN PREACHERS ["SDP"][77]; ST. JOSEPH'S WORKERS FOR LIFE & FAMILY ["StJW"][78]; STICHTING SCHREEW OM LEVEN ["SSOL"][79] STRASBOURG CONVERSATION CIRCLE ["SCC"][80]; THE COUPLE TO

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all who wish to live their faith by loving their neighbors in the person of the needy and by helping people regardless of race, color or creed. SSV has approximately 2,500 members (New Zealand's total population is only 3.5 million) drawn from throughout New Zealand.

[77]This group of five itinerant, Roman Catholic priests from Irving, Texas preach the gospel of Jesus Christ. They are pro-life.

[78]Located in Ottawa, Ontario, Canada, StJW has more than 2,500 members who, by their writings, conferences, lectures, interviews and availability to parents, seek to save the unborn, promote the family and save youth from destructive sex education.

[79]Formed in 1985 in Hilversum, Holland, SSOL has about 120,000 members who publish, issue press releases, conduct press conferences, demonstrate outside abortion clinics, give lectures and petition government to apply God's truth and His love to the issues of life.

[80]SCC is a group given to inviting pre-eminent scholars and intellectuals to lecture at its discussion circle. This group, drawn from all segments of society have one common belief: in the existence of given values, independent of the times

COUPLE LEAGUE OF BELGIUM VZW. ["CCLB"][81] THE COUPLE TO COUPLE LEAGUE FOR THE CZECH & SLOVAK REPUBLICS ["CCLCS"][82]; THE EPISCOPAL SUNOD OF AMERICA ["ESA"][83]; VICTIMS OF ABORTION NEW ZEALAND INCORPORATED ["VOA"][84]; VICTIMS OF CHOICE

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and society, which once neglected, have driven human beings into barbarism. One such value is the regard for the absolute holiness and inviolability of human life from conception until natural death. The patron of the SCC is His Imperial Highness, Dr. Otto von Habsburg, member of the European Parliament.

[81]CCLB is located in Rotselaar, Belgium and teaches natural family planning and promotes pro-life, pro-chastity and pro-family values in schools. Its 1,700 members are from Belgium and The Netherlands.

[82]Located inKladno, The Czech Republic, CCLCS teaches natural family planning and chastity and is opposed to abortion.

[83]Located in Ft. Worth, Texas, ESA, through its national membership of more than 18,000, seeks to uphold and extend traditional Christian teaching on theology and moral behavior within the Episcopal Church including as to the sanctity of human life, beginning at conception.

[84]VOA was founded in 1989 and incorporated in New Zealand in 1991. VOA is headquartered in Wellington, New Zealand and has nine branches each of which are staffed by a coordinator and

["VOC"][85]; WOMEN AFFIRMING LIFE ["WAL"][86]; WOMEN FOR FAITH AND FAMILY ["WFF"][87]; WOMEN FOR LIFE

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counselors. VOA is a post-abortion counseling organization for victims of abortion, including women, men, and children of women who have had abortions.

[85]VOC was incorporated about 10 years ago in California. VOC provides education, information and counseling to women, primarily those suffering from post-abortion syndrome. VOC's executive director travels throughout the United States to train counselors who then counsel women and educate the public on issues arising out of post-abortion syndrome. VOC publishes a manual and produces articles and pamphlets for a readership of between 2 and 3,000, and conducts workshops, conferences and seminars throughout the world.

[86]WAL was founded in 1990 and has its principal office in Boston, Massachusetts. Its membership of between 700 and 1,000 is drawn from 42 states. WAL's purpose is to voice the commitment of Catholic women in support of women and the dignity of life and motherhood and to serve as a national organization of Catholic women committed to upholding the sanctity of each human life from conception to natural death. WAL seeks to offer a public witness by women in defense of the unborn and unwanted through personal commitment, educational efforts, prayer and home and professional life.

[87]WFF, which has its main office in St. Louis, Missouri, was incorporated in 1984. WFF is a Catholic women's

(N.Z.), INC. ["WFL"][88]; WOMEN FOR WOMEN ["WFW"][89];

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organization which educates people on issues important to Catholics including those related to the family and is intended to aid women in their efforts to continually deepen their understanding of the Catholic faith. WFF is an organization committed to pro-life principles from conception to natural death.

[88]WFL is a New Zealand corporation, having been formed in 1978. Its national office is located in Auckland, New Zealand. WFL defends the rights of the unborn child from conception and supports the right to life of all persons until natural death. WFL supports and encourages women in their role as mothers, recognizing the major contributions made by them in their child-rearing and home-making roles. WFL has a membership numbering 2,000, which is drawn from many areas of New Zealand.

[89]WFW is a corporation that was formed in Indiana in 1987 to protect and foster respect for the sanctity of human life from the moment of conception until natural death. WFW upholds the Virgin Mary as a role model for women and recognizes the equality of men and women, while acknowledging their differences so as to promote the dignity and value of womanhood. WFW's membership derives from all denominations from 28 states, Canada, India and the Philippines.

WORLD ORGANIZATION FOR THE FAMILY ["WOFF"][90].

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case because the Court, in *Roe v. Wade*, 410 U.S. 113 (1973), declined to decide the most important issues presented by the instant petitions: when does the life of the child begin and, if the child is a human being prior to birth, does the child have constitutional rights?

The question of when the child's life begins was intentionally left to future courts because of the *Roe* Court's concern about the inadequacy of "man's knowledge" in 1973. This question is now before the Court in the first instance and the only criterion for its determination is the correctness of the Court's decision. Stare decisis principles (which might apply if *Roe* had attempted to resolve the inquiry) do not apply here. Thus, it is the Court's duty to resolve these questions because it is now clear that they can be resolved.

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[90]WOFF is dedicated to helping parents to remain primary educators of their children. The organization is a strong defender of human life from the moment of conception and they promote the natural method of family planning.

The Court has never considered the legal significance of the fact that the unborn child is a human being who experiences pain. No acceptance of *Roe* is possible until the Court does so.

In that a child is a human being prior to birth, none of the concerns of the Court as expressed in *Roe* (such as reliance and workability) are principles that preclude a decision which recognizes the child's right to live; a result different than that reached in *Roe*. Such a determination would demonstrate that *Roe*, in reality, is gravely at odds with the principles that protect the most basic of human rights: the welfare of children, even their very existence.

Until these central issues are addressed and the Court can state with conviction that all of the issues have been correctly decided, it is unlikely that *Roe* can ever be respected or accepted.

ARGUMENT

I. THE CENTRAL QUESTION PRESENTED IN THIS CASE HAS NEVER BEEN RESOLVED BY THE COURT, AND IS THEREFORE BEFORE THIS COURT AS AN "ORIGINAL MATTER." THE REQUIREMENTS OF STARE DECISIS FOR OVERRULING ROE V. WADE ARE COMPLETELY SATISFIED BY THE FACTS. THE COURT SHOULD GRANT THE WRIT AND DECIDE THE CHILD'S RIGHTS.

As much as anything else, this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) reaffirmed the central holding in the twenty-year old case of *Roe v. Wade*, 410 U.S. 113 (1973) based on principles of *stare decisis*.[91] In the Joint Opinion, the Casey Court said:

> We do not need to say whether each of us, had we been members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding. *Casey*, 112 S.Ct. at 2817.

The principles of *stare decisis* do not preclude a decision in the instant case which is different than that reached in *Roe* for two

[91] Two of the three authors previously expressed views that apparently challenged *Roe's* central holding; see, *Thornburgh v. A.C.O.G.*, 476 U.S. 747, 814, 828 (O'Connor, J., dissenting: "I do, however, remain of the views expressed in my dissent in *Akron[v. Akron]*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy'"). Justice Kennedy joined in the opinion of the Chief Justice in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in which he stated: "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability."

distinct reasons: (1) the central issue in this case (when does the life of the child begin and does he/she have constitutional rights before birth?) was never decided by *Roe*; and (2) even if the doctrine of *stare decisis* does apply, Loce and Krail satisfy all of the requirements necessary to overrule *Roe*.

A. THE QUESTION OF WHEN THE LIFE OF A CHILD BEGINS WAS NOT DECIDED BY *ROE* AND IT IS THEREFORE THE DUTY OF THIS COURT TO RESOLVE THE QUESTION. IT WAS THE PROMISE OF *ROE* THAT THIS COURT WOULD DECIDE THIS ISSUE WHEN "MAN'S KNOWLEDGE" WAS SUFFICIENT TO DO SO.

Roe did not decide when the life of a child begins. The *Roe* Court specifically found that, in 1973, it could not decide the question:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer. 410 U.S. at 159 (emphasis added).

Roe specifically reserved this particular issue for later Courts by recognizing that "man's knowledge" grows and expands with new information and greater appreciation of the old. *Roe* recognized that sufficiency of knowledge is a function of time and that, because "at

this point in the development of man's knowledge" the Court could not reach a conclusion, the question was reserved for future review.

Here, the issue is before the Court "in the first instance." The Court is in no sense bound by *Roe's* inability to decide this issue and *stare decisis* is not, therefore, applicable to the issue in this case. C.f., *Baker v. Carr*, 369 U.S. 186, 236-237 (1962); *Penna.-Reading, S.S. Lines v. Bd. of Pub. Utility Commrs.*, 74 A.2d 265 (N.J. 1950) (if facts, which form the basis for a constitutional principle in one case differ in a subsequent case, the first is not precedent for the second). The legal significance of the fact that the unborn child is a human being capable of experiencing pain has never before been considered.

Casey asks the nation to accept *Roe's* central holding in an effort to finally resolve a divisive national debate. But *Roe* itself *never ruled on the central issue*, thereby reserving it for future courts. There can never be an acceptance of *Roe* until this Court decides the central issue and is able to explain with conviction that its decision is legally correct. It would constitute a "breach of faith" with the people of this nation, as well as with the constitutional principles on

which the nation was built, if the Court leaves unaddressed the question on which the entire debate turns. By refusing to answer the question of when life begins, *Roe* essentially promised that the Court would answer the question when it was able to do so. It must now do so, correctly and with conviction.

"At this point in the development of man's knowledge" we now know that a child is a complete and separate human being from conception (and certainly long before "viability") (Loce pet. 13-21) and this known fact renders *Roe's* analysis of the child's rights irrelevant (Loce pet. 9-11). These issues have now devolved upon this Court for resolution and no interpretation of *stare decisis* principles relieves the Court of the duty to address them.

B. EVEN IF PRINCIPLES OF *STARE DECISIS* WERE APPLICABLE TO THIS CASE, BECAUSE OF NEW FACTS AND A NEW APPRECIATION OF OLD ONES, *STARE DECISIS* DOES NOT PREVENT THE COURT FROM FINDING THAT THE CHILD HAS CONSTITUTIONAL RIGHTS PRIOR TO BIRTH.

Casey described four principles of *stare decisis* which were felt to preclude the overruling of *Roe*: (1) no change of fact; (2) no inconsistency with other principles of constitutional law; (3) reliance; and (4) workability. *Casey*, 112 S.Ct. at 2808-2812. These

principles, rather than precluding review, actually are absent insofar as the issue of the child's rights is concerned.

1. New Facts and a New Appreciation of Old Ones.

Justice Douglas, a member of the *Roe majority*, has said of *stare decisis*:

> [A] search for a static security - in the law - is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas...and *through the adopting of others to current facts*. It is easy...to overemphasize *stare decisis* as a principle in the lives of men. ...*The difficulty is to estimate what effect a slightly different shade of facts will have*. (emphases added) Douglas, William O., *Stare Decisis*, 49 Colum. L. Rev. 735-743, 735-736 (1949).

The new information now available about when the life of a child begins, and the fact that the child experiences pain as early as eight weeks after conception (Loce pet. 13-30), are of particular importance in this analysis.

Firstly, once it is appreciated that the child is a human being who experiences pain before birth, the Court, in order to uphold *Roe*, would have to completely ignore prior holdings of this Court and other authorities. (Loce pet. 9-11; 30-40.) If *Roe* itself ignored precedent, it is difficult to conceive of a justification to extend any

precedental value to it. Doing so would frustrate *stare decisis* principles by allowing a maverick opinion which ignores stare decisis to effect a change in the law without regard to the doctrine, whereupon other courts would be bound by *the same rules of stare decisis* to follow the decision which originally ignored them.

Secondly, new facts, or the new appreciation of old facts, are often a basis for overruling precedent. The *Casey* Court found that there were no new facts before it concerning the state's power to intrude into a woman's personal decisions. *Casey*, 112 S.Ct. at 2811-2812. Yet, *Casey* cited with approval Justice Brandeis' dissent in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413 (1932), that, in many cases where the Court applies the due process clause, the issue before it is a mixed question of fact and law and the true nature of the factual inquiry should not be obscured merely because it is a court that is making the determination. 285 U.S. at 410-411. Whether an unborn child is a human being who enjoys constitutional rights is just such a mixed question of law and fact (Loce pet.11-13).

When this Court, in *Mapp v. Ohio*, 367 U.S. 643 (1961), overruled *Wolf v. Colorado*, 338 U.S. 25 (1949) (which was decided only twelve years earlier), the Court based its ruling on a new appreciation of facts which made adoption of the "exclusionary rule" necessary. *Mapp* is an example of a case which applied the due process clause and which involved a mixed question of fact and law. The facts suggested the need for a particular method to implement a recognized right. (In the strictest sense, abortion is seen as a method of implementing an underlying privacy right.) In *Baker v. Carr*, *supra* (in which the Court overruled *Colegrove v. Green*, 328 U.S. 547 (1946) and distinguished *Colegrove v. Barrett*, 330 U.S. 804 (1946)), the Court concluded that new facts required the result.

In Loce, two ultimate facts must now be taken into consideration: (1) that Mr. Loce's child was indeed a human being from the moment of conception; and (2) that children such as his experience pain (Loce p. 13-30). Both conclusions derive from a new appreciation of old facts. They require a new recognition of the interests of the child and father, they give rise to the child's rights and they impact upon the application of due process rights. *Burnet*,

supra, (Brandeis, J. dissenting), 285 U.S. at 405-413. In addition, our experiences since *Roe*, because of new advances in contraception, the disappearance of social stigma and the new information relating to the profound harm abortion causes the mother (Loce pet. 40-44), show that abortion is an unnecessary method of implementing the privacy interest sought to be protected, as well as one which unjustly impacts the child. C.f. *Mapp v. Ohio, supra*.

2. Whether *Roe* is in Conflict with Precedent Which is at Odds with Personal Liberties Depends Upon Whether the Child is a Human Being.

The *Casey* majority argued that *Roe* is not in conflict with precedent and does not influence developments that conflict with personal liberties. Once the child's humanity is acknowledged, as it must be (Loce pet. 13-40), this conclusion is unsupportable.

Casey requires that one ignore the reality that, before birth, the child is a human being who experiences pain. *Roe* conflicts with all law which has sought to protect the interests of children and is tragically fatal for the children who suffer during abortion, as well as to the many children who survive the procedure. Before *Roe*, the New Jersey Supreme Court held that the child was a separate person

whose life began at conception and who had constitutional rights before birth. *Smith v. Brennan*, 157 A.2d 497, 504-505 (N.J. 1960); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J. 1964). This principle of New Jersey law was recently reaffirmed in *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J. 1992). *Smith* and *Raleigh Fitkin* reflect New Jersey's strong policy in favor of protecting life. *Smith*, 157 A.2d 504-505; *Raleigh Fitkin*, 201 A.2d 532. This policy, prior to *Roe*, resulted in the protection of children from the pain and harm of abortion. See N.J.S.A. 2A:87-1. (Performing an abortion was a high misdemeanor which brought a penalty of fifteen years incarceration. See *New Jersey v. Novak*, 121 A.2d 521 (N.J. 1956); *New Jersey v. Siciliano*, 117 A.2d 490 (N.J. 1956)). In refusing to recognize the so-called tort of "wrongful birth", the New Jersey Supreme Court in 1967 eloquently explained New Jersey's public policy against abortion:

> It is basic to the human condition to seek life and hold on to it however heavily burdened. ...[T]he right to life is inalienable in our society. ...[W]e are not faced here with the necessity of balancing a mother's life against that of a child. The sanctity of a single human life is the decisive factor ... [I]t may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged

> determinants cannot stand against the preciousness of a single human life ... *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967).

Roe required that New Jersey abandon its policy of protecting children's lives. In 1979, even when *Roe* forced it to recognize the wrongful birth cause of action, New Jersey's Supreme Court noted:

> One of the most deeply held beliefs of our society is that life ... is more precious than non-life [citation omitted] ... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The federal constitution characterizes *life as one of the three fundamental rights* of which no one can be deprived without due process of law ... our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. CONST. (1947), ART. I, SEC. I. The declaration of independence states that the primacy of man's 'unalienable' right to life is a 'self-evident truth'. Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those of non-handicapped human beings. *Berman v. Allan*, 80 N.J. 421, 429, 404 A.2d 8 (N.J. 1979).

The harm created by *Roe* is clear when one recognizes that the unborn child is a human being. Law that was carefully developed to protect innocent lives was swept away because the Court failed to recognize that these were persons in fact. For the children who are not aborted, *Roe* is often cruel. New Jersey must now recognize a cause of action, the effect of which is to tell a child that a doctor

who failed to inform his or her parents that the child would be born with a handicap, must pay large monetary damages to the parents because they lost the opportunity to terminate the child's life before birth. See, *Berman v. Allan*, *supra; Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984). That these children must live with the knowledge that their lives are devalued by society (and even by their parents) to the extent that their parents are entitled to be compensated for their "wrongful births", is a detestable harm attributable directly to *Roe*.

A father has no right to demand that a woman have an abortion, nor should he. The embarrassment, hardship or distress that flow to him as a result of an unplanned pregnancy, whether or not he is prepared to rear or support the child, is irrelevant to whether society should extend to him the "right" to take the child's life. However, where the right he seeks to enforce is one which is consistent with the child's best interests, the same statute that imposes obligations upon him based on the single act of conception, extends to him the right to affirmatively discharge his obligations through custody or visitation and support. Likewise, under the adoption statutes, a judgment of adoption in favor of another man cannot be entered

against the natural father over his objection, unless there is a specific finding of abandonment or neglect. N.J.S.A. 9:3-46. The right of a natural father who is not married to the mother is based solely on his status as genetic father. See *In re Adoption of a Child by J.R.D.*, 588 A.2d 446 (N.J. Super. Ct. App. Div. 1990).

The issue can be framed in different ways. *Casey* may choose to frame it in terms of a father blocking the mother's right to take the life of her child. The State of New Jersey, on the other hand, proposes that the child's rights, and the father's enjoyment of the benefits of his relationship with his child (which are fundamental constitutional rights), can be entrusted to another who can terminate the child's life and destroy the relationship amongst the mother, father and child for any or no reason at all.

Building on *Roe*, *Casey* found that, although a father's constitutional rights and those of a mother are "equal" after birth, the mother's rights can be exercised so as to destroy those of the father before birth. *Casey*, 112 S.Ct. at 2830. This may be the consequence of *Roe*, but it is drastically in conflict with precedents dealing with the equal protection of the laws. See *Craig v. Boren*, 429 U.S. 190

(1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (gender based classifications require at least an interemediate level of scrutiny -- strict scrutiny if there is the denial of a fundamental right[92]).

Under the New Jersey Parentage Act N.J.S.A. 9:17-40 *et seq.*, the obligations of Mr. Loce as father derive from the fact of conception alone. The birth, of course, is the natural consequence of conception.

If the fundamental constitutional right of the father is implicated, then the creation of a classification extending exclusive decision making power to the mother violates equal protection principles because there is no compelling interest in the state to permit this. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Baker, supra*. If the father's constitutional rights are not fundamental, then the classification created is gender based and requires intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190 397 (1976). As a result, the state classification must serve important governmental objectives and be substantially related to the achievement of those objectives. The objective here is to protect the right of the mother to make decisions

[92] *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

about whether she should have children. See *Roe*, 410 U.S. at 153. That objective, however, is served once the mother conceives; she then has a child and, at that point, the inconvenience to the mother of carrying the child, although real and substantial, can never outweigh the child's interest in life.

3. Given the Fact that the Child is a Human Being, the Principles of Reliance and Workability Have no Application.

In *Casey* the Court said that, since some segments of our society have relied on the Court's holding in *Roe*, it should be affirmed *(Casey*, 112 S.Ct. at 2809), even if the Court cannot say that it was correctly decided in the first place. *Id.* at 2817.

By *Casey's* own estimation, the last case before the Court which required it to determine an issue of the magnitude of those raised here, was *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954). *Casey*, 112 S.Ct. at 2814-2815. The irony of *Casey's* discussion of reliance is in the fact that it was the very same argument made by those who sought in *Brown* to perpetuate racial segregation by affirming *Plessy v. Ferguson*, 163 U.S. 537 (1896). The reliance argument in *Casey* is indistinguishable from the reliance argument of

the four states which sought to preserve segregation in the consolidated cases that are collectively known as *Brown v. Bd. of Ed.*[93]

Arguing that longstanding principles which have been continually relied upon should be left unchanged, John W. Davis argued in *Briggs, supra*, that "somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance." 49A Landmark Briefs at 490. Davis asserted that the South Carolina statute must stand because:

> [W]e *relied* on the facts that this Court had, not once but seven times, ... pronounced in favor of the "separate but equal" doctrine. We *relied* on the fact that the courts of last appeal in some sixteen or eighteen states have passed upon the validity of

[93]*Brown* was actually a grouping of four segregation cases decided together. The other cases were *Briggs v. Elliott*, *Davis v. County School Board of Prince Edward County, Va.*, and *Gebhart v. Belton*. These cases concerned various statutes pertaining to school segregation in the states of Kansas, South Carolina, Virginia, and Delaware. Although, decided separately, *Bolling v. Sharpe*, 347 U.S. 497 (1954) was also argued with *Brown*. The initial oral argument for these cases occurred before the United States Supreme Court on December 9-11, 1952, with Chief Justice Vinson presiding. The cases were subsequently reargued at the Court's request on December 7-9, 1953, after Earl Warren succeeded Mr. Vinson as Chief Justice.

> the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment. We *relied* on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia. *Id.* (Emphases added).

Indeed, it was the theme of all of the states that desegregation was contrary to longstanding customs and traditions which were "deeply ingrained", the disturbance of which would cause such dire consequences that, on those grounds alone, *Plessy* had to be affirmed. See, J. Lindsay Almond, *id.* at 383-384; 512-513; Kansas, *id.* at 752; Davis, *id.* at 490-491; T. Justin More, *id.* at 407; 510-511; *Casey* observed:

> While we think *Plessy* was wrong the day it was decided, [citation omitted], we must also recognize that the *Plessy* court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to examine *Plessy* was on this ground alone not only justified but required. *Casey*, 112 S.Ct. at 2813.

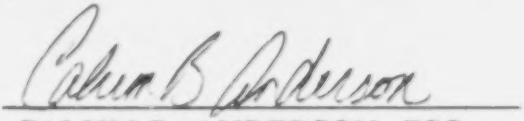
This statement is important in the instant case because, whether or not the *Roe* Court believed that it could determine when the life of a human being begins, no one can now, in light of current evidence, dispute that the biological life of a complete, separate and unique human being begins at conception. The Court likens *Brown* to *Roe*, but *Roe* more closely resembles *Plessy* than *Brown* and *Brown* more

closely resembles Loce than *Roe*. *Roe* simply does not possess the moral force of *Brown*. *Brown* corrected a wrong. *Roe* created one.

The Court should grant certiorari in this case without fear that the overruling of *Roe* will be any more difficult to implement than was the ruling in *Brown* -- and no harder for the public to accept. When it is understood that these children are human beings who experience pain and that the premise of this nation is that the life of every human being has value and that each one of us is unique and irreplaceable, an acceptance of the overruling of *Roe* will follow.

CONCLUSION

Because *Roe* did not decide the central issues presented by this case, and the principles of *stare decisis* as applied to this case do not otherwise preclude the overruling of *Roe*, the Court should grant the writ of certiorari as requested.



CALUM B. ANDERSON, ESQ.

U.S.
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#'s 93-1148 and 93-1149

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

#93-1148

ALEXANDER LOCE, *Petitioner,*

v.

STATE OF NEW JERSEY, *Respondent.*

#93-1149

TINA KRAIL, et. al., *Petitioners,*

v.

STATE OF NEW JERSEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF

JOSEPH SCHEIDLER
AND THE PRO-LIFE ACTION LEAGUE

AND OF **TEXAS BLACK AMERICANS FOR LIFE** AS
AMICI CURIAE IN SUPPORT OF PETITIONER LOCE AND
PETITIONERS KRAIL, ET. AL.

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QUESTIONS PRESENTED

Whether anything in the Due Process Clause, as explained in Roe v. Wade, requires the states to make any person a criminal?

Whether the decision of the trial court, pursuant to Roe, to exclude evidence which negates the criminal state of mind places Roe squarely at odds with other precedents of this Court?

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INTEREST OF THE *AMICI*

Joseph Scheidler and the Pro-Life Action League seek to promote public awareness of the prevalence of abortion, and to protest against its performance; Joseph Scheidler and the Pro-Life Action League were named party defendants/respondents in this Court's case of first impression, decided Monday, January 24, 1994, on the question of whether a plaintiff in a case based on the Racketeer Influenced and Corrupt Organizations Act (RICO) must prove an economic motive on the part of the defendants.

Texas Black Americans for Life is an organization which seeks to promote awareness that abortion is a tool of racial genocide.

SUMMARY OF ARGUMENTS

The holding of the trial court, which will be followed in other cases, overrules this Court, places its precedents at odds with one another, and illustrates that Roe v. Wade fosters erroneous decisions by the lower courts.

Not allowing one to introduce evidence which negates the criminal state of mind violates the Due Process Clause. Also, Roe does not even require the exclusion of the evidence offered at trial.

Nothing in the Due Process Clause requires the states to make any person a criminal.

This case illustrates that Roe v. Wade is unsound in principle and unworkable in practice.

Planned Parenthood v. Casey succeeded only in confusing the law of *stare decisis*. Further, this case will enable this Court to do what it wanted to do in Casey but was unable to accomplish.

ARGUMENT

I. NOTHING IN THE DUE PROCESS CLAUSE REQUIRES THE STATES TO MAKE ANY PERSON A CRIMINAL.

The trial court concluded that the conviction of the defendants was compelled by Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), which was based on the Due Process Clause of the Fourteenth Amendment. But the Due Process Clause has never been held to require the states to make any person a criminal; it has only been used the other way—prohibiting the states from making persons criminals in certain instances.

The submission that the Due Process Clause, which *prohibits* the states from extending their criminal laws against private citizens in certain instances, now *affirmatively requires* the states to extend their criminal laws against private citizens in certain instances, is too novel a theory for this Court to let stand.

The trial court's holding turns our entire body of jurisprudence on the Due Process Clause inside out. That view of the Due Process Clause is like looking through a pair of binoculars the wrong way. And it is statism, one of the things which the Fourteenth Amendment was designed to protect us against.

By taking this case, this Court can prevent the development of the erroneous notion that the Due Process Clause requires the states to make certain persons criminals. If this Court refuses to take this case, it can only set the stage for a more egregious upheaval in our law later on, when the doctrine is firmly entrenched.

II. THE LANGUAGE OF ROE v. WADE DOES NOT REQUIRE THE EXCLUSION OF THE EVIDENCE OFFERED AT TRIAL.

The trial court erred in thinking Roe requires a court to exclude evidence, offered by the defense in a criminal case, which

demonstrates a reasonable, good faith belief that an unborn child is a person. The language of Roe does not support this conclusion.

This Court said in Roe,

> "All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729, 35 L.Ed.2d at 180.

This Court also said,

> "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182.

A. THERE IS NO STATE ACTION.

In Roe, the State of Texas could not, by adopting one theory of life, override the rights of the pregnant woman. But the case at bar involves action by a private citizen, not by a state. And without state action, there is no denial of Due Process. As this Court said,

> "The Fourteenth Amendment protects this [Due Process] interest, however, only from a deprivation by state action. Private use of state-sanctioned private remedies or procedures does not rise to the level of state action." Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565, 575 (1988).

This Court noted, in the same paragraph, that state action may be found "...when private parties make use of state procedures with the overt, significant assistance of state officials... ." 485 U.S.

at 486, 108 S.Ct. at 1345, 99 L.Ed.2d at 576. But no such thing occurred here.

Nor is the law of the State of New Jersey pertaining to the reasonable, good faith belief of the need to protect a third person an attempt to frustrate Roe. For that law pertains to all cases in which the defense of a third person is implicated, not just abortion. State v. Fair, 45 N.J. 77, 90-91, 211 A.2d 359, 366 (1965).

Further, the provisions of New Jersey law relied on for the affirmative defenses have been in existence since long before Roe. Article One of the Constitution of the State of New Jersey was adopted in 1947. N.J.S.A. 2C: 3-5 and 18-3 are simply reenacted versions of statutes which were in place since 1898.

Also, as Prof. Knowlton has explained, the other affirmative defense provisions which were asserted were simply formal codifications of the law of the State of New Jersey as it had already existed. *See*, Knowlton, Comments Upon the New Jersey Penal Code, 32 Rutgers L. Rev. 1, 3 (1979).

Further, the reluctance of the New Jersey judicial system at all levels to rule in favor of the petitioners demonstrates that the law of the State of New Jersey is not an attempt to frustrate Roe.

B. FOURTEENTH AMENDMENT PERSONHOOD IS NOT AN ELEMENT OF THE AFFIRMATIVE DEFENSES.

The trial court based its decision on this Court's holding in Roe that an unborn child is not a person within the meaning of the Fourteenth Amendment. But this has no application here.

Fourteenth Amendment personhood is a status whereby a given *res* may assert its own rights against state action. With the exception of *in rem* proceedings, the status is inherent—at all times, for all purposes, and against all others—in the *res* itself; it exists independently of anyone else's actions or thought processes.

The focus of the affirmative defenses raised at trial, however, is simply not on the thing sought to be protected; the defenses pertain to something which exists only for a moment in the mind of the criminal defendant: the reasonable, good faith belief which motivated the conduct.

Fourteenth Amendment personhood (i.e. the possession by a *res* of federal rights against state action) need not obtain in the thing sought to be protected; the governing personhood is personhood within the meaning of state law. For it is from the state constitution that the legislature and the state courts derive their authority to pronounce the affirmative defenses, and to define the terms therein; and one of the defenses is Article One of the state constitution itself.

The language of the leading New Jersey case would even, on its face, support the position that the status of personhood need not obtain in the thing sought to be protected. Indeed, if someone used force to prevent someone from burning a rumpled-up bundle of clothing which he reasonably, and in good faith, thought was a person lying helpless on the ground, the fact that there was only clothing would not seem to defeat the defense.

Consider what the Supreme Court of New Jersey said,

> "There are, however, two approaches as to the scope of the right of one person to intervene in defense of another. One is that the fault of the defended party is imputed to the one who intervenes on his behalf, while the other is that the intervening party is bound only by his own intent. The former, commonly referred to as the 'alter ego' rule, emphasizes that the right of one person to defend another is co-extensive with the right of the other to defend himself. The latter categorized as the 'objective test' theory, proceeds on the thesis that one who intervenes in a struggle under a reasonable but mistaken belief that he is protecting another who he assumes is being unlawfully assaulted is thereby exonerated from criminal liability. As stated by

Bishop (1 Bishop, Criminal Law (Sect.) 303, p. 204 (9th ed. 1923)):

> 'What is absolute truth no man ordinarily knows. All act from what appears, not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move. *** All, therefore, must, and constantly do, perform what else they would not, through mistake of facts. *** '

"See generally 1 Wharton supra, (Sect.) 219; Comment, 20 Wash. & Lee L. Rev. 98 (1963); Comment, 64 W.Va. L. Rev. 342 (1962).

"New Jersey has aligned itself with the latter view; the test of whether a party may intervene in defense of a third person being determined by the subjective intent of the intervenor, subject only to the qualification that a jury objectively find that he reasonably arrived at the conclusion that the *apparent* victim was in peril, and that the force he used was necessary. Thus, the so-called "reasonable mistake of fact" doctrine is given its due, both as to the amount of force and the initial lawfulness of the intervention, *and precludes criminal liability* even though it later appears that the person in whose behalf he intervened was in fact the aggressor or that no defensive measures on his part were actually necessary. [citations omitted] Such a view has been recommended by the American Law Institute in its Model Penal Code..." (citation omitted) State v. Fair, 45 N.J. 77, 92-93, 211 A.2d 359, 367-368 (1965). (emphasis supplied)

Thus we see that the Supreme Court of New Jersey, upon careful consideration of the question, expressly rejected the doctrine which says that the defenses are available only when the one sought

to be protected is in fact a person who has the right to self-defense. The focus instead is solely on the state of mind of the defendant.

III. NOT ALLOWING ONE TO INTRODUCE EVIDENCE WHICH NEGATES THE CRIMINAL STATE OF MIND VIOLATES THE DUE PROCESS CLAUSE.

The effect of a denial of this petition will be to exclude the evidence offered at trial, and set as precedent the exclusion of similar evidence in future cases, at least in the State of New Jersey. This Court has recognized, however, that not allowing the introduction of relevant evidence in a criminal case violates the Due Process Clause. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 (1973); U.S. v. Nixon, 418 U.S. 683, 711-713, 94 S.Ct. 3090, 3109-3110, 41 L.Ed.2d 1039, 1066-1067 (1974). Such shall be the case here if the petitioners are not afforded their opportunity to present evidence of their reasonable, good faith belief that an unborn child is a person.

Under New Jersey law, defense of a third person negates an element of the prosecution's case in chief: the criminal state of mind; and New Jersey law requires the introduction of such evidence. As the New Jersey Supreme Court said,

> "An essential element of the charge of murder is malice [citation omitted], and in order for criminal liability to attach there must be a concurrence of an 'evil-meaning mind with an evil-doing hand.' [citations omitted] Basically, the so-called 'affirmative defense' of defense of another in murder cases *negates the existence of the essential element of malice*. What was said in State v. Abbott, 36 N.J. 63, 72, 174 A.2d 881, 868 (1961), in connection with self-defense is equally applicable to defense of a third party:
>
> > *** '...if such evidence appears either in the State's case or upon the defendant's case, the issue must be left to the jury with this instruction: that the burden

> is upon the State to prove beyond a reasonable doubt that the defense is untrue, and hence there must be an acquittal if there is a reasonable doubt as to whether defendant did act in self-defense within the definition of that defense. ***' " State v. Fair, 45 N.J. 77, 90-91, 211 A.2d 359, 366 (1965) (emphasis supplied).

In Chambers and Nixon this Court effectively recognized that censorship in the courtroom is as destructive of liberty as censorship in the press. The Court should not retreat from this.

IV. THE DECISION OF THE TRIAL COURT PROMOTES A GROSS BREACH OF THE SEPARATION OF POWERS AND OF FEDERALISM.

It would be difficult to imagine a more radical breach of the separation of powers. If this Court were to acquiesce continually in holdings such as this one, this Court would effectively require the states to repeal certain laws of their own and make new ones against private citizens whose actions frustrate restrictions which this Court has placed on state action, not on the action of private citizens.

Further, given the federal nature of our Union, it would be difficult to imagine a more gross breach of federalism, going even beyond the boundaries set down in Missouri v. Jenkins, 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). For in Jenkins, at least, this Court construed the scope of authority of Article III courts under an act of Congress.

The acceptance by this Court, and other federal courts, of what happened in this case, however (and will happen again in later cases), would completely circumvent the requirement recognized in Jenkins that the overriding of state sovereignty by federal law take place only in pursuance to an act of Congress specifically intended to do such a thing. *See also*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

This would constitute a dangerous precedent for allowing this requirement to be completely overlooked in other areas, effectively rendering the federal judiciary a body of general jurisdiction rather than one of a limited nature.

It would render the Tenth Amendment a curiosity, a conversation piece, or perhaps, at best, an interesting piece of wallpaper. But it would cease to be a statement of law in our most basic governing document.

V. CLARIFICATION BY THIS COURT IS NEEDED BECAUSE THE HOLDING OF THE TRIAL COURT OVERRULES THIS COURT, AND DEMONSTRATES THAT ROE PLACES THIS COURT'S PRECEDENTS AT ODDS WITH ONE ANOTHER WHILE FOSTERING ERRONEOUS DECISIONS BY THE LOWER COURTS.

In Planned Parenthood v. Casey the Joint Opinion expressed the view that courts building upon Roe will not be likely to hand down erroneous decisions as a consequence. Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2810, 120 L.Ed.2d 674, 702 (1992) (Joint Opinion). But the trial court's action in the instant case, overruling this Court's precedents, and setting them at odds with each other, belies that view, as does the record subsequent to Roe.

Eventually this Court must rule on the issues presented in this case. If it denies certiorari in every such case presented, it will have ruled *sub silencio on* these issues, but without giving society the benefit of its reasoning.

A. THE TRIAL COURT OVERRULED THIS COURT.

By refusing to consider evidence of the petitioners' reasonable, good faith belief that Mr. Loce's unborn child was a person in need of their intervening help, the trial court overruled this Court's holdings in Chambers and Nixon, *supra*. Other courts, following the lead in this case, will do so also.

B. ROE REQUIRES UNHEARD OF AND UNWARRANTED APPLICATIONS OF THE DUE PROCESS CLAUSE.

If this Court allows judgments such as the one in this case to stand, it will be irrefutable that this Court will have allowed an expansion of Due Process law into the field of affirmatively requiring the states to make certain persons criminals. So radical a change as that should not come from a silent Court.

Further, unless this Court eventually reverses a case like this one, it will be equally clear that this Court will have accepted the unheard of doctrine that nonpersonhood status in one thing diminishes the rights held by another, one who is a person. Such a radical change as this likewise should not come from a silent Court.

Also, Roe has even been relied upon to enjoin the operation of a state statute without there ever being a finding of unconstitutionality or any other violation of federal law. Ragsdale v. Turnock, 734 F.Supp. 1457 (N.D. Ill. 1990); *aff'd* 941 F.2d 501 (7th Cir. 1991); *cert. den. sub nom.* Murphy v. Ragsdale, ___U.S. ___, 112 S.Ct. 879, 116 L.Ed.2d 784 (1992). In that case the District Court accepted a settlement proposal in which the Attorney General of a state and some private citizens literally rewrote a state statute, actions on their part which clearly lacked any authority under the state constitution.

Simultaneously, that settlement proposal struck down the most basic health and safety requirements: that an abortion clinic's hallways be wide enough for an ambulance stretcher to pass through, that any such clinic be within a few minutes' ambulance ride of a hospital, and that the ventilation system be designed to prevent widespread contamination by airborne bacteria, which can cause infections in a woman's bleeding reproductive tract. Thanks to that settlement proposal, it is now legal in the State of Illinois for the abortionist to scrub his hands in the same sink in which the janitor cleans his toilet bowl brush.

It gets worse. Roe has been relied on to strike down a state statute prohibiting fetal experimentation or the sale of unborn children. Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-1377 (N.D. Ill. 1990), *aff'd* 914 F.2d 260 (7th Cir. 1990); *cert. den. sub nom.* Scholberg v. Lifchez, 498 U.S. 1069, 111 S.Ct. 787, 112 L.Ed.2d 850 (1991).

C. ROE SETS THIS COURT'S PRECEDENTS AT ODDS WITH ONE ANOTHER.

In Casey the Joint Opinion noted that if Roe were to portend a development "at odds with other precedent for the analysis of personal liberty," this would prove to be grounds for overruling Roe. *See*, Casey, *supra*, 112 S.Ct. at 2812, 120 L.Ed.2d at 704. Such is what has happened here. For in not allowing the petitioners to introduce evidence negating the criminal state of mind, the trial court set this Court's precedents of Roe, on the one hand, and Chambers and Nixon, *supra*, on the other hand, at odds with one another.

We are left wondering what is good law and what isn't. The words of the Joint Opinion in Casey are again applicable here:

"Liberty finds no refuge in a jurisprudence of doubt." 112 S.Ct. at 2803, 120 L.Ed.2d at 693.

Also, the concept that the Due Process Clause places an affirmative obligation on the states to make certain persons criminals has never arisen in our jurisprudence before, and will be applicable, as a practical matter, only against those who engage in civil disobedience because of their political and religious opposition to abortion. As such, it will effectively be "a law directed at speech itself," in contravention of this Court's First Amendment holding in Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2541, 105 L.Ed2d 342, 355 (1989).

Further, even though the trespass statute under which the petitioners were convicted may be generally applicable to all, so as

to avoid any clash with the Free Exercise Clause of the First Amendment, it will remain the case, nevertheless, that the doctrine that the Due Process Clause itself affirmatively requires the states to make certain persons criminals will not be generally applicable to all; this doctrine itself will be applied only to abortion protesters, and as such will contravene this Court's numerous prior holdings. *See*, Employment Division v. Smith, 494 U.S. 872, 876-878, 110 S.Ct. 1595, 1599-1600, 108 L.Ed.2d 876, 884-885 (1990).

D. THE TRACK RECORD UNDER ROE DEMONSTRATES THAT ROE IS THE PROBLEM.

The above cited examples of chaos in our jurisprudence all have one thing in common: Roe. In Casey the Joint Opinion speculated that Roe might be *sui generis*. But *sui generis* just doesn't explain it. Roe is a renegade---an accident waiting for the next opportunity to occur, waiting for its next victim (Due Process, the First Amendment, unborn children, federalism, the separation of powers, expectant fathers, etc.) to step in line.

The chaos begins in Roe itself, as the Joint Opinion in Casey learned when it tried to untangle the basic premise of Roe from Roe's rigid, trimester framework 112 S.Ct. at 2816-2821, 120 L.Ed.2d at 709-716. Roe was also contradictory in its approach to the relevance of biomedical facts to the protection of the unborn.

This Court first said that the findings of the discipline of biology were of no moment in determining whether an unborn child is a person or not. 410 U.S. at 159, 93 S.Ct. at 730, 35 L.Ed.2d at 181. But just a few pages later this Court then went on to deny protection to the unborn in the early stages of pregnancy on the basis of "the now-established medical fact...that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 163, 93 S.Ct. at 731-732, 35 L.Ed.2d at 182. This juxtaposition of reliance on medical facts to deny protection for the unborn, coming immediately after a total disregard for such facts in recognizing rights for the unborn, suggests a double standard in the most obvious way.

Significantly, the Joint Opinion in Casey chose to recognize the obvious: medical facts pertaining to the unborn child---in Casey, the concept of viability---are indeed relevant in determining the status of laws pertaining to the unborn child. 112 S.Ct. at 2817, 120 L.Ed.2d at 710.

Yet Roe remains today what Justice White said of it on the day it was decided: "...an exercise of raw judicial power...an improvident and extravagant exercise of the power of judicial review...[with] no constitutional warrant..." *See*, Roe, 410 U.S. at 222, 93 S.Ct. at 763, 35 L.Ed.2d at 196 (White, J., dissenting).

Roe has tied the cloth of our jurisprudence in a knot. It has done so before. *See*, Bopp and Coleson, The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal, 2 B.Y.U. J. Pub. L. 181 (1989). It continues to do so now. It begs for reversal.

VI. THIS CASE ILLUSTRATES THAT ROE v. WADE IS UNSOUND IN PRINCIPLE AND UNWORKABLE IN PRACTICE.

The clash of interests here is irreconcilable: On the one hand we have pregnant women claiming a constitutional right under the Due Process Clause, a right which the justices who authored the Joint Opinion in Casey admitted they might not have recognized had the case been before them in the first instance. *See*, Casey, *supra*, 112 S.Ct. at 2817, 120 L.Ed.2d at 711.

On the other hand we have the protesters claiming their right under the Due Process Clause, a right never questioned by this Court, to present evidence which negates the criminal state of mind. The need of the State of New Jersey to uphold the law and preserve the peace, meanwhile, is well known to all.

The arguments of the petitioners—which we accept—regarding the personhood of unborn children aside for a moment, this case does illustrate, if nothing else, that there is a compelling

state interest in the area of abortion, an interest which requires the overruling of Roe.

Roe is unsound in principle and unworkable in practice. As this Court has noted, if a prior holding of this Court is later found to be unsound in principle and unworkable in practice, that will constitute grounds for overruling the prior case. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546, 105 S.Ct. 1005, 1015, 83 L.Ed.2d 1016, 1031 (1985). The Joint Opinion in Casey recognized this would apply to Roe. *See*, Casey, *supra*, 112 S.Ct. at 2809, 120 L.Ed.2d at 700.

A. ROE IS NOT NEEDED TO PROTECT WOMEN AGAINST FORCED ABORTIONS.

In Casey the Joint Opinion expressed the concern that without Roe women could be forced to undergo abortions against their will. 112 S.Ct. at 2811, 120 L.Ed.2d at 703. But as Justice O'Connor pointed out in a case involving the other end of life's spectrum, any forced bodily invasion would constitute a classic example of a forcible restraint of one's liberty; it would also constitute an intrusion into one's body of the type that would burden the woman's liberty, dignity, and freedom to determine the course of her own life. Thus, it would run afoul of this Court's previously stated notions of constitutionally permissible state action. *See*, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. at 287-289, 110 S.Ct. at 2856-2857, 111 L.Ed.2d at 247-249 (1990) (O'Connor, J., concurring).

VII. PLANNED PARENTHOOD v. CASEY SUCCEEDED ONLY IN CONFUSING THE LAW OF *STARE DECISIS*.

In Casey the Joint Opinion went to great lengths to state that the decision reached therein was required by the doctrine of *stare decisis*. *See*, Casey, *supra*, 112 S.Ct. at 2808-2816, 120 L.Ed.2d at 699-709. Paradoxically, however, the Joint Opinion overruled this Court's precedent on *stare decisis* without even stating why it was doing so.

In 1932 Justice Brandeis penned his famous dissent in which he wrote,

> "Stare decisis is usually the wise policy, because in most matters is more important that the applicable rule of law be settled than that it be settled right. [citation omitted] This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." (citation omitted)

Burnett v. Coronado Oil and Gas Co., 285 U.S. at 406-408, 52 S.Ct. at 447-448, 76 L.Ed. at 823-825 (1932) (Brandeis, J., dissenting). The footnotes in Justice Brandeis' opinion, omitted above, and footnote four of his opinion following the above quoted text, cite a very large number of cases as examples of what he was saying.

The force of this logic was finally expressly adopted by this Court a year after Roe was decided. *See*, Edelman v. Jordan, 415 U.S. 651, 671, n. 14, 94 S.Ct. 1347, 1359, n. 14, 39 L.Ed.2d 662, 667, n. 14 (1974). It has been followed by this Court since then. *See*, Solario v. U.S., 483 U.S. 435, 450, 107 S.Ct. 2924, 2933, 97 L.Ed.2d 364, 378 (1987).

In Casey, however, the Joint Opinion did not follow this precedent on *stare decisis*. The Joint Opinion did not even confront the issue, let alone explain why it was doing what it did. Only a fleeting reference to Burnett was made, one which did not even acknowledge the fact that Justice Brandeis' reasoning had been adopted by this Court. *See*, Casey, 112 S.Ct. at 2808, 120 L.Ed.2d at 700.

Consequently, the Joint Opinion, in attempting to uphold the doctrine of *stare decisis*, overruled this Court's precedent on *stare decisis*, and succeeded only in confusing that area of law. That this should be done by only three members of this Court---and *only* in an abortion case!---speaks volumes about this Court's willingness to bend the rules any time the topic of abortion is at hand.

Is the rule of Justice Brandeis, adopted by this Court in Edelman, still good law? Further clarification is needed.

In reconsidering this question (which Casey means this Court must surely do again someday), this Court should recognize that of the two views of *stare decisis* on constitutional law---the view of Justice Brandeis, and the one adopted by the Joint Opinion in Casey---only one is consistent with the nature of a constitution. For if a constitution is a standard against which all other law---opinions of this Court included---is to be measured, then any departure from it, whether it be legislative or judicial in nature, must be recognized as error and corrected.

Chief Justice John Marshall, in considering a case in constitutional law, reminded us,

"...we must never forget that it is a *constitution* we are expounding." McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579, 602 (1819). (emphasis in original)

To do otherwise is to stand the very nature of a constitution on its head. The substantial obstacles raised by Article V to the amending of the U.S. Constitution were created to protect the minority from the whim of the majority. But if this Court adopts the same rule about overruling erroneous precedent in constitutional law as it does in statutory cases, it will place upon a minority the impossible task of obtaining a super majority to amend the Constitution so as to overrule the erroneous precedent. A decision by this Court not to overrule erroneous precedent on constitutional

issues will thus become a means of turning the guarantees of Article V inside out.

The opinion of Justice Brandeis gives further instruction, saying,

> "In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.
>
> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution. **** *This is strikingly true of cases under the due process clause* when the question is whether a statute is unreasonable, arbitrary, or capricious..." *See*, Burnet, *supra*, 285 U.S. at 409-410, 52 S.Ct. at 448-449, 76 L.Ed. at 826. (emphasis supplied)

In Casey the issue was what would happen to the Court's legitimacy if it should overrule precedent. 112 S.Ct. at 2814-2816, 120 L.Ed.2d at 706-709. But none will ever question the legitimacy of a Court which recognizes that it must submit itself to the very Constitution which it is established to uphold and defend, and which pays homage to the patriots who fought and gave their lives to enshrine that document as the supreme law of the land.

VIII. THIS CASE WILL ENABLE THIS COURT TO DO WHAT IT WANTED TO DO IN CASEY BUT WAS UNABLE TO ACCOMPLISH.

In Casey the Joint Opinion stated that the Court was reaching the decision it did because doing so was necessary to fulfill this Court's perceived mission to take on such issues and settle them

with finality on behalf of the nation as a whole. Casey, *supra*, 112 S.Ct. at 2815, 120 L.Ed.2d at 708. In doing so the Joint Opinion went to great lengths to reaffirm Roe's central holding repeatedly, so as to leave no doubt as to what it was doing. 112 S.Ct. at 2804, 2808, 2816-2818, 2821, 120 L.Ed.2d at 694, 699, 709-712, 715-716.

Simultaneously, however, the Joint Opinion went out of its way to note that none of the criteria for reexamining the precedent of Roe *de novo* seemed to be present, and that thus the Court would not do so in that case. 112 S.Ct. at 2808-2816, 120 L.Ed.2d at 699-709. This was true even though those who authored the Joint Opinion declared that they were expressing no comment as to whether they would have agreed with the holding in Roe had the case been before them in the first instance. 112 S.Ct. at 2817, 120 L.Ed.2d at 711. The possibility of reexamining Roe at a later date, when the right case came along, was reserved by the Joint Opinion. 112 S.Ct. at 2808-2815, 120 L.Ed.2d 699-704, 706, 708-709.

These two concepts—settling Roe once and for all, and expressly avoiding reexamining it *de novo* (while keeping that option open for a future case), operate to the exclusion of each other. Roe can never be settled once and for all while this Court keeps brushing aside opportunities to reexamine it and tell us whether it is truly a case which can stand the test of time.

There could be no better case for finally settling this once and for all. For if this Court is going to reaffirm Roe in a case in which:

1.) the father of an unborn child was turned down by the judiciary in his attempt to seek an injunction against the destruction of his own child;

2.) one in which the trial court denied him the opportunity to present evidence which negates the criminal state of mind, thereby overruling the precedents of this Court itself on that point;

3.) one in which voluminous testimony of new facts elucidated since Roe was offered at trial by internationally renowned experts in support of the personhood of the unborn child and the newly found capacity of unborn children to feel pain;

4.) one in which this Court would, for the sake of preserving Roe, adopt the extraordinary new doctrine that the Due Process Clause places an affirmative obligation on the states to make certain persons criminals (and one which would apply to no one of any other political or religious conviction, at that);

5.) one in which this Court would, for the sake of preserving Roe, adopt the extraordinary new doctrine that nonpersonhood status in one thing diminishes the rights held by one who is a person;

6.) one in which this Court would, for the sake of preserving Roe, countenance a breach of the highest order of the separation of powers and of federalism; and

7.) one in which this Court, for the sake of preserving Roe, would be content to leave its precedents concerning Due Process and First Amendment interests at odds with themselves;

then nothing will ever get this Court to change its mind about Roe. And those of us who someday hope to achieve an overruling of Roe will know that no short term gain is to be had, and that our strategy must be for the long term in the strictest sense.

On the other hand, if Roe is the type of case which will not stand the test of time, and will fall upon reexamination of it *de novo*, there could be no better case than this one for telling us that this is so.

Either way, this case will enable this Court to do what it wanted to do in Casey but could not accomplish: settle the status of Roe once and for all.

IX. THE RECORD AT THE TRIAL LEVEL INVITES A REEXAMINATION OF ROE.

The record at trial is well developed. The petitioners presented ample evidence of facts newly elucidated since Roe was decided concerning the personhood Mr. Loce's unborn child, and its capacity to feel pain; there was also ample opportunity for cross-examination.

In Casey the Joint Opinion expressed the view that when the facts underlying a prior holding are newly found to be different from what this Court had previously assumed, the new finding will constitute grounds for overruling a prior case such as Roe. 112 S.Ct. at 2811-2812, 120 L.Ed.2d at 703-704. The Joint Opinion even noted that such newly discovered facts can not only justify overruling a prior case of great public notoriety, they can even require it, as was the case in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954).

The issues of personhood, and the capacity to feel pain, being as important as they are, we submit that such is the case here.

The task before this Court may be daunting, but the application of reasoned judgment to the facts of this case will enable this Court to perform this task, one which it ultimately must face anyway. *See*, Casey, *supra*, 112 S.Ct. at 2806, 120 L.Ed.2d at 697.

This Court should take this case and overrule Roe.

CONCLUSION

Wherefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

TINA KRAIL, ET ALS.,

Petitioners,

- against -

THE STATE OF NEW JERSEY,

Respondent.

BRIEF AMICUS CURIAE OF MOTHER TERESA OF CALCUTTA, IN SUPPORT OF PETITIONERS' PETITIONS FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Mother Teresa resides at 541A Ach. Jagdish, Ch. Bose Rd., Calcutta, India 700 016. She is the founder and Mother Superior of the Order of the Missionaries of Charity. The Order maintains its headquarters in Calcutta, India. The Missionaries of Charity have provided services to the needy in many parts of the world, including the United States of America, where the Order's main office is located at 335 East 145th Street in the Bronx, New York. Much of the work of the Missionaries of Charity involves providing charitable services to children and to poor families. Through this work Mother Teresa and the Missionaries of Charity have a special interest in the welfare of all children, born and unborn, and the familial relationship between children and their mothers and fathers.

SUMMARY OF ARGUMENT

The unborn child possesses an inalienable right to life which must be recognized and safeguarded by any just society.

ARGUMENT

I. THE QUESTION WHETHER UNBORN HUMAN BEINGS POSSESS THE INALIENABLE RIGHT TO LIFE IS OF THE GREATEST IMPORTANCE AND MUST NOT BE AVOIDED BY THIS COURT.

I hope you will count it no presumption that I seek your leave to address you on behalf of the unborn child. Like that child I can be called an outsider. I am not an American citizen. My parents were Albanian. I was born before the First World War in a part of what was not yet, and is no longer, Yugoslavia. In many senses I know what it is like to be without a country. I also know what it is like to feel as an adopted citizen of other lands. When I was still a young girl I travelled to India. I found my work among the poor and the sick of that nation, and I have lived there ever since.

Since 1950 I have worked with my many sisters from around the world as one of the Missionaries of Charity. Our congregation now has some over 400 foundations in more than 100 different countries, including the United States of America. We have almost 5,000 sisters. We care for those who are often treated as outsiders in their own communities by their own neighbors -- the starving, the crippled, the impoverished, and the diseased, from the old woman with a brain tumor in Calcutta to the young man with AIDS in New York City. A special focus of our care are mothers and their children. This includes mothers who feel pressured to sacrifice their unborn children by want, neglect, despair, and philosophies and governmental policies which promote the dehumanization of inconvenient human life. And it includes the children themselves, innocent and utterly defenseless, who are at the mercy of those who would deny their humanity. So, in a sense, my sisters and those we serve are all

outsiders together. At the same time, we are supremely conscious of the common bonds of humanity that unite us and transcend national boundaries.

In another sense no one in the world who prizes liberty and human rights can feel anything but a strong kinship with America. Yours is the one great nation in all of history which was founded on the precept of equal rights and respect for all humankind, for the poorest and weakest of us as well as the richest and strongest. As your Declaration of Independence put it in words which have never lost their power to stir the heart:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. . . .

A nation founded on these principles holds a sacred trust: to stand as an example to the rest of the world, to climb ever higher in its practical realization of the ideals of human

dignity, brotherhood, and mutual respect. It has been your constant efforts in fulfillment of that mission, far more than your size or your wealth or your military might, that have made America an inspiration to all mankind.

It must be recognized that your model was never one of realized perfection, but of ceaseless aspiration. From the outset, for example, America denied the African slave his freedom and human dignity. But in time you righted that wrong, albeit at an incalculable cost in human suffering and loss of life. Your impetus has almost always been toward a fuller, more all-embracing conception and assurance of the rights which your founding fathers recognized as inherent and God-given. Yours has ever been an inclusive, not an exclusive society. And your steps, though they may have paused or faltered now and then, have been pointed in the right direction and have trod the right path. The task has not always been an easy one, and each new generation has faced its

own challenges and temptations. But, in a uniquely courageous and inspiring way, America has kept faith.

Yet there has been one infinitely tragic and destructive departure from those American ideals in recent memory. It was this Court's own decision in 1973 to exclude the unborn child from the human family. Roe v. Wade, 410 U.S. 113 (1973). You ruled that a mother, in consultation with her doctor, has broad discretion, guaranteed against infringement by the United States Constitution, to choose to destroy her unborn child. Your opinion stated that you did not need to "resolve the difficult question of when life begins." 410 U.S. at 159. That question is inescapable. If the right to life is an inherent and inalienable right, it must surely obtain wherever human life exists. No one can deny that the unborn child is a distinct being, that it is human, and that it is alive. It is unjust, therefore, to deprive the unborn child

of its fundamental right to life on the basis of its age, size, or condition of dependency. It was a sad infidelity to America's highest ideals when this Court said that it did not matter, or could not be determined, when the inalienable right to life began for a child in its mother's womb.

America needs no words from me to see how your decision in Roe v. Wade has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts -- a child -- as a competitor, an intrusion, and an inconvenience. It has nominally accorded mothers unfettered dominion over the independent lives of their physically dependent sons and daughters. And, in granting this unconscionable power, it has exposed many

women to unjust and selfish demands from their husbands or other sexual partners.

Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign. The Constitutional Court of the Federal Republic of Germany recently ruled:

> The unborn child is entitled to its right to life independently of acceptance by its mother; this is an elementary and inalienable right which emanates from the dignity of the human being.

Judgment of May 28, 1993, The Constitutional Court of the Federal Republic of Germany, Judgment of the Second Senate, 20 EuGRZ 229-275 (consolidated case nos. 2 BzF2/90, 2 BzF 4/92, 2 BzF 5/92). Americans may feel justly proud that Germany in 1993 was able to recognize the sanctity of human life. You must weep that your own government, at present, seems blind to this truth.

I have no new teaching for America. I seek only to recall you to faithfulness to what you once taught the world. Your nation was founded on the proposition -- very old as a moral precept, but startling and innovative as a political insight -- that human life is a gift of immeasurable worth, and that it deserves, always and everywhere, to be treated with the utmost dignity and respect.

CONCLUSION

I urge the Court to take the opportunity presented by the petitions in these cases to consider the fundamental question of when human life begins and to declare without equivocation the inalienable rights which it possesses.

Respectfully submitted,

MOTHER TERESA OF CALCUTTA

Robert P. George

ROBERT P. GEORGE, ESQ.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TINA KRAIL, ET ALS.,

Petitioners,

- against -

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF PETITIONERS, KRAIL, CHADWICK, SMOLDORE AND HENDERSON, IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE NEW JERSEY COURTS, IN THIS CASE, RULED THAT THE PETITIONERS' ARRESTS AND CONVICTIONS WERE REQUIRED IN ORDER TO PRESERVE THE CONSTITUTIONALLY PROTECTED INTEREST OF A WOMAN IN AN ABORTION. WHETHER SUCH AN INTEREST IS PROTECTED UNDER THE FOURTEENTH AMENDMENT, THEREFORE, IS PERTINENT TO THE PETITIONER'S CONTENTIONS THAT THESE PROSECUTIONS ARE AN UNCONSTITUTIONAL APPLICATION OF THE CRIMINAL STATUTE.

A. INTRODUCTION

The state, in its response, claims that, among other things, the questions of whether the mother in this case actually possessed an interest in terminating her child's life is "irrelevant" to the constitutionality of petitioners convictions.[1] The state's claim is wrong. The Appellate Division's opinion affirming the convictions rests upon two distinctly separate but material legal conclusions. First, the court rejected petitioners' argument that New Jersey was required to acquit the petitioners based upon the Fourteenth Amendment because the United States Supreme Court has not yet

[1] These petitioners adopt the legal argument found in the reply brief of petitioner, Loce. This brief filed on behalf of the Krail petitioners addresses more particularly the protectibility of the interest New Jersey sought to protect in this case.

expressly recognized that the child has constitutional rights [1-87-A-88]. Second, the court held that it was not free to acquit the petitioners on federal [or State] grounds because it *was required to convict* petitioners because the United States Supreme Court has previously held that a woman has a "right to an abortion". The Appellate Division stated:

> the purported rights asserted by defendants, independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighted, are firmly established. *The simple and overriding fact is that each defendant committed [an]...offense in an attempt to prevent a legal and constitutionally protected abortion. [A-87-A-88; emphasis added].*

The Appellate Division found that the *overriding fact* was petitioners attempt to prevent what the court believed as a "constitutionally protected abortion." Whether the mother had a "protectable" interest in taking the life of her child is a question necessary to determine if the Court's "overriding" consideration was a valid exercise of its police power.

Thus the State's asserted purpose and interest in petitioners' convictions rests first upon the conclusion that a mother has an interest in terminating her child's life protected by the Due Process Clause. An application of a facially valid statute is unconstitutional

if the state's interest is not sufficiently important when weighed against the deprivation of the rights of the petitioner and the child. See, *Wayte v. United States*, 470 U.S. 598, 611 (1985). This court has never determined what effect the fact that the child is a complete, separate, unique human being would have upon that determination. Clearly the child's humanity and the mother's real interests protected by the Fourteenth Amendment directly bear upon the constitutionality of petitioners' convictions.

B. THE INTERESTS THAT HAVE ENJOYED TRADITIONAL PROTECTION ARE THE CHILD'S INTEREST IN LIFE, AND WELFARE, AND A MOTHER'S INTEREST IN PROTECTING BOTH THE LIFE OF HER CHILD AND HER RELATIONSHIP WITH HER CHILD. THE LAW AND TRADITIONS OF NEW JERSEY AND THIS NATION HAVE NEVER RECOGNIZED AS PROTECTIBLE A MOTHER'S "INTEREST" TO TERMINATE THE LIFE OF HER CHILD--AN "INTEREST" COMPLETELY OPPOSED TO THE BASIC FABRIC OF ALL LAW PROTECTING MOTHERS AND THEIR CHILDREN, AND THE VERY FUNCTION OF GOVERNMENT ITSELF.

Once the fact of the child's existence is recognized, a perceived "interest" one may assert to terminate the life of a child, at any age of development, cannot be - based upon principles of constitutional interpretation - an interest protectible under the due process clause of the Fourteenth Amendment because: [1] all established law and

tradition protects the child, and a mother's relationship with her child; [2] taking the life of the child is completely opposed to the fundamental policies and purposes of these traditional protections - protections that form the core of all civilazed society; and [3] a destruction of the protections of the actual life of a child and a mother's relationship with her child is a violation of the basic purposes for which government was established.

1. The Sources of Protected Interests Under the Due Process Clause and the Criteria for Determining Which Interests Enjoy Protection Within the Scope of "Liberty."

(a) The Sources of Due Process Generally.

Each of the three great interests protected by the Due Process Clause - life, liberty and property (more precisely described as "bundles of interests") - have separate and distinct sources. The interests in life protectable under the clause are those derived from the natural and inalienable right to life, not a grant of government, but possessed by every human being, independent of any qualification other than the existence of the individual member of the human race, the object of its protection. [see Loce Pet., Pt. II]. The property interests protectible under the clause are basically those created by common law and state law. *Board of Regents v. Roth,*

408 U.S. 564, 577 (1972).

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlements to those benefits. *Bd. of Regents,* 408 U.S. at 577.

This understanding was recently cited with approval. *Delaware v. New York*, __ U.S. __, 113 S.Ct. 1550, 1557; see also, and compare *Meachum v. Fano,* 427 U.S. 215, 224-227 (1976); *Leis v. Flynt*, 439 U.S. 438 (1979); *Codd v. Velger,* 429 U.S. 624, 628 (1977); *Bishop v. Wood,* 426 U.S. 341 (1976); *Arnett v. Kennedy,* 416 U.S. 134 (1974); *Bd. of Curators, Univer. of Mo. v. Horowitz,* 435 U.S. 78 (1978); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

The source of the liberty interests protected by the Due Process Clause has been the subject of many of this Court's decisions, and although it has caused significant debate among its sitting jurists, the principles of law which apply to this case are clear and well established.

Graham v. Richardson, 403 U.S. 365 (1971) declared:

> This court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a 'privilege'. Id, at 374.

Now the Court must first examine the precise nature of the

asserted "interest" at stake. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). Second, whether the "interest", its "nature" having been determined, is one protected by the due process clause requires the application of a number of principles.

It is axiomatic that the term "liberty" in the Due Process Clause extends beyond mere freedom from physical restraint. *Board of Regents v. Roth*, 408 U.S. at 272; *Meyer v. Nebraska*, 252 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Michael H. vs. Gerald D.*, 491 U.S. 110, 121-122 (1989) [Scalia, J., plurality opinion] (see also Brennan, J., Dissenting, 491 U.S. at 137). Reaching beyond simply listing examples of "interests" protected, the case law provides both positive and negative criteria used to determine which "liberty interests" are protected by the due process clause.

(b) Determining "Protectible Liberty Interests" - the Positive and Negative Criteria.

It has been repeatedly stated by this Court that the Due Process Clause protects interests (or liberties) so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). It has also been said that

pronouncements of this court which identify those interests protected by the clause:

> Reflect 'continued insistence upon respect for the teaching of history [and] solid recogniations of the basic values that underline or socity...' *Michael H. v. Gerald D.*, 491 U.S. 110, 122-123; Scalia, J., writing for the plurality [Rehnquist, C.J., O'Connor, J., and Kennedy, J., joining] quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

Employing these positive criteria - "tradition and history," "the conscience of our people," and "recognition of the basic values that underlie socity," the court has recognized as interests protected by Due Process those fundamental to a strong family life, such as a "right to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those principles long recognized...as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*,262, U.S. at 399.

There has been significant, even contentious debate over the precise definition of the "deeply rooted traditions" from which interests derive their protection. Some members of the court argue for a broader definition and some seek a narrower one. See *Moore v. East Cleveland*, 431 U.S. 494,502 (1977); see and compare the

plurality opinion of Justice Scalia, *Michael H. v. Gerald D.*, 491 U.S. 110, with the dissents of Justice Brennan, 491 U.S. at 136, and Justice White, 491 U.S. at 157.

Regardless of whether the Court employed a broad or narrow definition of the history and traditions criteria, in the present case there is no doubt that a child's life is protected by Due Process, a mother's relationship with her child is protected as a liberty interest, and an "interest" in taking the life of a child by a mother could never be recognized as a protected liberty interest. All of the positive criteria, - history and tradition; the fundamental function of government, the dictates of the natural and inalienable rights of both mother and child; and the conscience and basic values that underlie society - all require protection of a mother's relationship with her child, her other interests (see IIc of Krail Pet.) and protection of the child's life (See Pt. II of Loce Pet.). None support the asserted "interest" of a mother to kill her own child at any age of development. Conversely, no new theory could be created to include a right to terminate the life of a child in an effort to broaden concepts of liberty protections because such an interest fails the negative criteria.

First, it would destroy those interests long protected. See, e.g. Smith v. Organ. of Foster Fam., 431 U.S. 816, 838-847 (1977). Second, it would be offensive to our sense of justice. See, e.g. *Rochin v. California*, 342, U.S. 165, 169-173 (1958).

2. The Traditional Protections of the Child and a Mother's Relationship with Her Child.

(a) The Traditional Protection of the Child.

One of the greatest and most important functions served by the state is the protection it has traditionally provided the children within its borders. In its exercise of its *parens patriae* jurisdiction, New Jersey has traditionally protected the family unit, and its continued maintenance to advance the welfare of children. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986); *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A2d 1227 (1988). When, however, a family separates, the overriding interest is the welfare of the child, so that a custody dispute is resolved based upon the child's best interests. *Fantony v. Fantony*, 122 A.2d 593 (1956).[2] Even when the fundamental constitutional right of a parent to the companionship of

[2] The best *interests of the child* standard has been traditionally employed in all fifty states. See, Atkinson, J., *Modern Child Custody Practice*, Kluwer Law Book Publishers, Inc., New York, New York, 1986, Chap. 4, p. 217-315; See also appendices following Chap. 4.

her child is threatened by termination of all parental rights, the ultimate question is harm to a child, so if there is likely harm of a certain magnitude those rights will be terminated. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. 1986).

This focus upon the welfare of a child, even when the traditionally protectible rights of parents are terminated, is consistent with the opinions of this Court which have scrutinized state terminations of parental rights protected by the Fourteenth Amendment. *Santosky v. Kraemer*, 455 U.S. 745 (1982); See, and compare, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Stanley v. Illinois*, 405 U.S. 645 (1972). An alleged "interest" of a parent to harm, or an "interest" which is harmful to, a child, is simply not part of the protected parental rights under the Due Process Clause of the Fourteenth Amendment.

Traditionally, New Jersey protects children even during pregnancy, under its *parens patriae* jurisdiction, against a parents' conduct which threatens the child's life. *Raleigh Fitkin-Paul Morgan*

Memorial Hospital v. Anderson, 201 A.2d 537 (1964).[3]

Indeed, New Jersey traditionally recognized that a child's life begins at conception and the child enjoys the right to live, prior to birth, under the state constitution. The child's actual existence from conception was recognized in *Smith v. Brennan,* at 157 A.2d 497, 501-503 (1960):

> ...a child is in existence from the moment of conception and not merely a part of its mother's body. 31 N.J. at 362. It is clear...that before birth an infant is a distinct [human being] and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth. 31 N.J. at 364.

In *Raleigh Fitkin, supra,* New Jersey found that the child's rights were personal to the child, and, as a separate human being, the court appointed a guardian ad litem. 201 A.2d at 538. This holding reflects the child's constitutional right to life under Art. I, Sec. I of the state constitution:

> The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor ... it may have been easier for the mother and less

[3] The history and tradition of this nation has always included the protection of the child even during pregnancy in many contexts limited only by the scientific understanding available. See authorities from states cited in appendix C at A-31 to A-57 bound with Loce Pet.; see also the various circumstances in which the British Common Law protected the child and the child's interest at the earliest age at which science could establish the child's actual existence. App D at A-58 to A-71.

> expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life... . *Gleitman v. Cosgrove*, 227 A.2d 689, 693-694 (1967).

Even after *Roe* was decided, the New Jersey Supreme Court reaffirmed the child's constitutional right to live prior to birth under the state constitution and the state's policy of protecting life:

> One of the most deeply held beliefs of our society is that life ... is more precious than nonlife [citation omitted] ... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The Federal Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law ... our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), Art. 1., Sec. 1. The declaration of independence states that the primacy of man's *'inalienable' right to life is a 'self-evident truth.'* Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those of non-handicapped beings. *Berman v. Allan*, 404 A.2d 8, 13 (N.J. 1979) [emphases added].

As recently as 1992, the New Jersey Supreme Court reaffirmed that portion of *Gleitman*, *supra*, which held that the state constitution extends a right to live to children prior to birth:

> In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' [citation omitted] and found that, '[e]ugenic considerations are not controlling,' *ibid.*, noting that considerations of financial burden to the father and convenience of the mother *did not outweigh the child's right to live, albeit imperfectly. Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J.

1992) [emphasis added].

(b) The Traditional Protection of a Mother's Relationship with Her Child.

New Jersey has a strong and long-standing policy to protect a mother's relationship with her child during pregnancy,[4] which protects against the destruction of the mother's relationship with her child and the exploitation of the mother during pregnancy. The fundamental policy of New Jersey's adoption laws is to preserve the relationship of a mother and child during and after pregnancy and protect it against exploitation and undue influences. *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A.2d at 1248-1250; *A.L. v. P.A.*, 517 A.2d 171 (A.D. 1986). Likewise, New Jersey protects a mother's relationship with her child from exploitation, pressures and inducements of surrogate contracting arrangements even when she had promised to conceive and carry a child for another couple, and terminate her relationship after birth. *Matter of Baby M* at 1248-1250. This protection is based upon the

[4] The deep-rooted respect for this relationship is found in western literature replete with statements that recognize that this relationship is at the heart of an ordered culture. It is "the nearest and dearest" known to mankind. Aeschylus, "Eumonides" translated by George Thompson, Greek Play's in Modern Translation (Dudley, Fitts, ed. 1947) at 130.

long-standing policies which protected the mother's relationship even after her promises, made before or during pregnancy, to surrender her relationship, whether it be to adoption or under the terms of a surrogacy arrrangement. New Jersey refuses to enforce such a promise because a decision by a mother to terminate her relationship with her child, made during pregnancy, regardless of counseling, is uninformed as a matter of law. *Matter of Baby M* at 1248.[5]

When parents are separated at a child's birth, and they disagree on custody, New Jersey's strong commitment to preservation of the mother's relationship requires that the child initially be left in the custody of the mother (if she desires it) unless there is a clear showing that the child will be harmed because the mother is unfit. *Matter of Baby M* at 1261. This policy is based on the recognition that the interests of a mother and child, at every stage of the child's development, is the most cherished and best protected in all of

[5] The standards in adoption services promulgated by the Child Welfare League of America forbids enforcement of a mother's surrender of her parental rights made before birth. See, CWLA Standard for Adoption services, sec.2.20. All states refuse to recognize the validity of a mother's decision to surrender until after her child is born, and in most instances she has a right to revoke a consent given after birth. See, *Adoption Factbook, United States Data, Issues, Regulations and Resources*, National Committee for Adoption, Wash. D.C., 1989, p. 20; See also chart, p. 22-33.

human experience. The New Jersey laws against abortion were designed to protect the mother's interests as well as those of the child. *See, New Jersey v. Novak*, 121 A.2d 521 (1956); *New Jersey v. Siciliano, 117 A.2d 490 (1956);* New Jersey v. Colmer, *122 A.2d 325 (A.D. 1957); N.J.S.A. 2A:87-1.*

The relationship and the benefits a mother derives from it are too important, too sacred to destroy it at all, by inducement or threat, or in the circumstance where it is impossible for her to truly appreciate the nature of her act. Any method of termination of a mother's relationship with her child before birth is contrary to all existing law and policy in New Jersey.[6]

3. An "Interest" of a Mother to Terminate Her Child's Life is Unprotectible.

An "interest" of a mother to terminate the actual life of her child has no source in law or the traditions of this nation. It cannot be

[6] In *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983), the interest of a mother in her child's relationship was eloquently described:

> [the law protects] the profound importance of the bond between a parent and child to the emotional life of each. *Frequently each party to the relationship depends heavily on his ties with the other for his sense of self-worth, for his very self-definition.* To rephrase the point in the language of entitlement, the parent's right to the preservation of his relationship with his child *derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring. Id.* at 599 [emphases added].

listed as a "liberty" interest protected by the Due Process Clause because it meets none of the positive criteria; it is not rooted in "traditions of history"; protection of such an interest is not rooted in "the conscience of our people"; its protection would not constitute the recognition of basic values that underlie our society." *See, Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Morrisey v. Brewer,* 408 U.S. 471, 481-483 (1972); *Smith v. Organ. of Foster Fam.*,431 U.S. 816, 838-847 and 858-863 (1977); *compare* plurality opinion, Brennan, J., 491 U.S. at 137; *c.f., Meachum v. Fano,* 427 U.S. 215, 224-227 (1976); *Ruckleshaus v. Monsanto Co.,* 467 U.S. 986, 1001-1003 (1984); *Codd v. Velger,* 429 U.S. 624, 628 (1977); *Ingrahm v. Wright,* 430 U.S. 651, 672-673 (1977); *Webb's Fab. Phar., Inc. v. Beckwith,* 449 U.S. 155, 161 (1980).

The "interest" of a mother in terminating her child's life is not merely without a legitimate source, it is directly opposed to all of the interests of a mother and child which have always enjoyed protection. The repugnat nature of this "interest" precludes it as "protectible" because, by necessity, it destroys the natural right of the child and the fundamental rights of the mother in their

relationship. *Smith v. Organ, of Fos. Fam.*, 431 U.S. 846. In *Smith*, the majority observed that for one to have a recognized liberty interest, it cannot operate to "derogat[e]" the substantive due process rights of another. 431 U.S. at 846. (See also, concurring opinion of Justice Stewart, 431 U.S. at 856-863.) It derogate's a mother's own traditionally protected interest.[7] If it is inherently bad for her best interests it cannot rise to the level of a protected interest.

The constitution, and the society of individuals whose collective interests it serves to protect, must protect the relationship of a mother and her child. Simply because an individual, in a time of crisis, asserts an alleged "interest" -- one repugnant to those traditionally protected -- does not, and cannot give rise to an obligation on the part of that society, particularly by operation of that constitution, to assist, accomodate or protect the act of destroying the life of a child and the cherished relationship a mother has with her child -- the very objects of the most fundamental and necessary protections in all of civilized society. The constitution,

[7] Nothing in *Casey*, (e.g., at 112 S.Ct. 2804-2807) is contrary to these observations. *Casey* did not address the humanity of the child and therefore did not analysis the nature of the "interest" to terminate the life of an actual child.

and the people for whom it exists, can only protect one set of these interests: either it protects the lives of those within its jurisdiction, or it protects the taking of those lives; either it protects a mother's relationship with her child, or it protects an interest in destroying it.

Likewise, for an interest to be protectable under the Due Process Clause it must be just. Protection of the interest must not offend our sense of justice. *Rochin v. California*, 342 U.S. 165, 169-173 (1958). If protection of the deliberate termination of a child's life, does not offend our sense of justice, then we are not the nation we intended to be. Deliberately killing a child at any age is, by its nature, unjust.

Neither *Roe* nor *Casey*, although protecting an "interest" in abortion, recognized an interest in actually killing a child.[8] A government which expressly authorizes or participates in the termination of a child's life has failed to perform the legitimate function for which it was created. The purpose and duty of the

[8] Even if such an interest were "protectible" (which it cannot be), it could never outweigh the child's right to live. See and compare, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

government is to protect its people and the lives of all within its jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885).

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the collective interests of the individuals for whom it exists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go. If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother in her relationship with her child has, at every moment of life, intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this

relationship, its unselfish nature and its role in the survival of the race, is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life -- she is the trustee of it.

CONCLUSION

Since the purpose of the state's action in removing, arresting and convicting the petitioners was to accomodate the "right" of Ms. Z. to terminate her child's life, the constitutionality of the convictions in this case rests upon New Jersey's conclusion that, even if the child was a complete, separate and unique human being, the child's mother had an interest in killing the child which was protected by the Fourteenth Amendment. This Court has never ruled that a mother has such an interest protected by the liberty clause of the Fourteenth Amendment.

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